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SUPREME COURT, U.S.

In The

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-529

WES WISE, et al.,

Petitioners,

v.

ALBERT L. LIPSCOMB, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To The Honorable Judges of Said Court:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered May 9, 1977.

CITATIONS TO OPINIONS BELOW

The opinion of the district court is reported at 399 F.Supp. 782, and is printed in Appendix B hereto, infra, p. B-1. The opinion of the court of appeals is reported at 551 F.2d 1043, and is printed in Appendix D, infra, p. D-1.

JURISDICTION

The judgment of the court of appeals was rendered and entered May 9, 1977. Appendix C, infra, p. C-1.

Rehearing was denied July 13, 1977. Appendix E, infra, p. E-1.

The mandate of the court of appeals was issued August 8, 1977. Appendix C, infra, p. C-1. The mandate of the court of appeals was recalled and the judgment of that court was stayed by order by Mr. Justice Powell, dated August 30, 1977. Appendix G, infra, p. G-1.

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

(1) May the court of appeals disregard the rule established by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Burns v. Richardson*, 384 U.S. 73 (1966), that a State's freedom of choice to devise substitutes for apportionment plans found unconstitutional should not be restricted beyond the clear commands of the Equal Protection Clause?

(2) May a State, in fashioning remedies to correct an unconstitutional dilution of the voting rights of one minority group, consider the voting rights of a second minority group, absent a judicial determination that the voting rights of the second minority have been unconstitutionally impaired?

(3) May the court of appeals invalidate a state-initiated use of at-large voting based upon the need for representation of a city-wide perspective in municipal government, where there has been no finding that such at-large voting invidiously minimizes or cancels out the voting strength of any identifiable group?

STATUTES, CHARTERS, ORDINANCES AND RESOLUTIONS INVOLVED

The case involves the following provisions of statutes, charters, ordinances and resolutions:

(1) Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596:

> "1. All powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and four commissioners, who together shall be known and designated as the board of commissioners, all of whom shall be elected by the qualified voters of the city at large, and shall devote their entire time to the service of the city."

(2) Charter of the City of Dallas, 1931, ch. III, sec. 9, at 16:

> "Section 9. Except as otherwise provided by the Charter of the City of Dallas all powers conferred on the City shall be exercised by a City Council to be composed of nine members, nominated and elected in the manner hereinafter provided. The members of the City Council shall be elected by the qualified voters of the entire city, and they shall each be elected for a term of two years and until their respective successors shall have been elected and shall have qualified."

(3) Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4 at 19:

> "All qualified voters of the city shall be entitled to vote for one candidate for each 'place number'."

(4) City of Dallas Resolution Number 75-0207, sec. 1:

> "Section 1. That the City Attorney be, and he is hereby directed to notify the Judge of the United States District Court for the Northern District of Texas, Dallas Division, that it is the intention of the majority of this City Council to pass an ordinance, when prepared by the City Attorney, which will adopt the present eight residential districts as single member districts, with one individual Councilman to be elected from each of the districts and living in the district,

and with three individuals, including the Mayor, to be elected at-large with no residential requirements other than that the candidate live within the City limits of Dallas."

(5) Ordinance Number 14800 of the City of Dallas, sec. 2:

"Section 2. As a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7 and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11."

THE PARTIES

Petitioners are the mayor and members of the City Council of the City of Dallas, Texas.

Respondents are a class composed of the Negro citizens of the City of Dallas, who were plaintiffs in the district court, and a group of Mexican-American intervenors who were denied class certification in the district court.

STATEMENT OF THE CASE

The legislative powers of the City of Dallas (see article 1175, Tex. Rev. Civ. Stat. Ann.) are exercised by an eleven-member city council. At the time this litigation was begun all eleven members were elected at-large from the entire city. Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4, at 19, Appendix A. infra, p. A-1; *Lipscomb v. Wise,* 399 F.Supp. 782 at 785 (N.D. Tex. 1975), Appendix B, infra, p. B-4. At-large elections in various forms have been used in Dallas since at least 1907. Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art.

III, sec. 1, at 596, Appendix A, infra, p. A-1; Charter of the City of Dallas, 1931, ch. III, sec. 9, at 16, Appendix A, infra p. A-1; Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4, at 19, Appendix A, infra, p. A-1; *Lipscomb v. Wise,* supra, 399 F.Supp. at 785, Appendix B, infra, p. B-4.

Suit was brought in the United States District Court for the Northern District of Texas by Negro and Mexican-American voters who sought a determination that the at-large election of all city council members unconstitutionally diluted their voting strengths. Jurisdiction of the district court was based upon 28 U.S.C. Section 1343 (3), (4).

The Mexican-American plaintiffs were dismissed from the suit, and the district court rendered judgment that the at-large election of all members of the council was unconstitutional. The district court then "gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan", *Lipscomb v. Wise,* supra, 399 F.Supp. at 792, Appendix B, infra, p. B-16, and retained jurisdiction pending the adoption of a plan by the City.

The city council reapportioned itself, enacting an ordinance which requires the election of eight members from single-member districts and the at-large election, city-wide, of the remaining three members, one of whom simultaneously serves as mayor. *Lipscomb v. Wise,* 551 F.2d 1043, 1045-1046 (5th Cir. 1977), Appendix D, infra, p. D-2; *Lipscomb v. Wise,* supra, 399 F.Supp. at 791, Appendix B, infra, p. B-15; City of Dallas Resolution 75-0207, sec. 1, Appendix A, infra, p. A-1; City of Dallas Ordinance No. 14800, sec. 2, Appendix A, infra, p. A-2.

The plan enacted by the council was reviewed and found constitutional by the district court. *Lipscomb v. Wise,* supra, 399

F.Supp. at 792, 795, 797, 798, 800, Appendix B, infra, pp. B-16, B-22, B-25, B-26, B-27, B-32.

The district court found that the combination of single-member and at-large positions would afford Mexican-Americans a "greater opportunity for participating in the political process." *Lipscomb v. Wise,* supra, 399 F.Supp. at 792, Appendix B, infra, p. B-17.

The district court further found that the "need for a city-wide view on the part of the council" also forms a valid basis for partial at-large representation, citing the advantages of having a non-sectional viewpoint expressed in zoning matters, city planning and the budget. *Lipscomb v. Wise,* supra, 399 F.Supp. at 794, Appendix B, infra, p. B-21.

The Court of Appeals for the Fifth Circuit reversed and remanded, citing this Court's decision in *East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), holding that there was no "special circumstance" which would permit the at-large election of three of the eight council members, and prohibiting the at-large election of any council member other than the mayor. *Lipscomb v. Wise, supra,* 551 F.2d at 1048, Appendix D, infra, p. D-9. The court of appeals did not purport to determine the constitutionality of the plan enacted by the city council.

All parties petitioned for rehearing, and the court of appeals denied those petitions July 13, 1977. Appendix E, infra, p. E-1.

The court of appeals denied petitioners' motion for stay of the mandate of that court. Appendix F, infra, p. F-1.

The mandate of the court of appeals was recalled and the judgment of that court stayed by order of Mr. Justice Powell, dated August 30, 1977. Appendix G, infra, p. G-1.

REASONS FOR GRANTING THE WRIT

1. The court of appeals has established a rule of law in conflict with this Court's prior decisions by limiting beyond the clear commands of the Equal Protection Clause a State's freedom of choice to devise a substitute for an apportionment plan found unconstitutional.

This Court has held that when a legislative apportionment plan is held unconstitutional by reason of numerical imbalance or dilution of minority voting strength the legislative body shall be given an opportunity to devise its own reapportionment plan to eliminate constitutional deficiencies. *Reynolds v. Sims,* 377 U.S. 533, 586 (1964), *Burns v. Richardson,* 384 U.S. 73, 85 (1966). See also *Gaffney v. Cummings,* 412 U.S. 735, 751 (1973). If the legislative body timely adopts a remedial apportionment plan, it is subject to review only to the extent that it must meet the "clear commands of the Equal Protection Clause." *Burns v. Richardson,* supra, 384 U.S. at 85. If the legislature fails to adopt its own remedial plan within a reasonable time, or if its plan violates the Equal Protection Clause, the district court is authorized to devise and order implementation of a plan. *Whitcomb v. Chavis,* 403 U.S. 124, 162 (1971). Such court-ordered reapportionment plans must not only satisfy the requirements of the Equal Protection Clause but must also conform to the federal common law of voting rights remedies, which forbids the court-initiated use of at-large voting except under unusual circumstances. *East Carroll Parish School Board v. Marshall, supra,* 424 U.S. at 639-640 (1976). This Court has never held that state-initiated reapportionment plans are subject to the closer scrutiny by which court-ordered plans must be tested, but instead has declared that the standards for evaluating

the use of at-large voting in remedial apportionment plans differ depending on whether the use of at-large voting is initiated by a federal court or a state legislative body. *Chapman v. Meier,* 420 U.S. 1, 18 (1975), *Connor v. Finch,* ____ U.S. ____, 97 S.Ct. 1828, 1833 (1977).

The Court of Appeals for the Fifth Circuit in the instant case recognized that the use of at-large voting stems from "Dallas' longstanding public policy in favor of at-large voting." *Lipscomb v. Wise,* supra, 551 F.2d at 1046, Appendix D, infra, p. D-5. See also Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596, Appendix A, infra, p. A-1; Charter of the City of Dallas, 1931, ch. III, sec. 9, at 16, Appendix A, infra, p. A-1; Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4, at 19, Appendix A, infra, p. A-1. Cf. *Kilgarlin v. Hill,* 386 U.S. 120, 123-124 (1967). The court of appeals also acknowledged that the plan approved by the district court was "enacted as a city ordinance following the [district] court's decision that the prior system was unconstitutional." *Lipscomb v. Wise,* supra, 551 F.2d at 1045, Appendix D, infra, p. D-3. The court of appeals nevertheless stated that the council's reapportionment plan could be approved only if "the election plan proposed and formally adopted by the city council is (1) constitutional and (2) otherwise in accordance with the federal common law of voting rights remedies". *Lipscomb v. Wise,* supra, 551 F.2d at 1046, Appendix D, infra, p. D-4. The court of appeals did not purport to determine the constitutionality of the City's reapportionment plan, but held the plan contrary to federal common law and, therefore, invalid because there appeared to be no special circumstances to justify at-large voting. *Lipscomb v. Wise,* supra, 551 F.2d at 1048, Appendix D, infra, p. D-9.

The use of at-large voting in the City of Dallas was not initiated or imposed upon the City by a federal court, cf. *Chapman v. Meier,* supra, 420 U.S. at 18, 19, but instead was initiated by the State more than sixty years before this litigation began. Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596, Appendix A, infra, p. A-1. *Lipscomb v. Wise,* supra, 399 F.Supp. at 785, 797-798, Appendix B, infra, p. B-4, p. B-27. The plan itself was created as a legislative act of the City Council of the City of Dallas.[1]

The City's reapportionment plan in its entirety is a "state-initiated apportionment scheme", in the sense that it was enacted by a state legislative body. Cf. *Chapman v. Meier,* supra, 420 U.S. at 14, 18. The use of at-large representation as one aspect of that plan is a device which is "state-initiated", in the sense that at-large voting was first used in Dallas by act of the Texas Legislature, nearly seventy years ago. Cf. *Beer v. United States,* 425 U.S. 130, 139 (1976).

The use of at-large voting by the City of Dallas, therefore, is "state-initiated" within the meaning of *Chapman v. Meier,* supra, 420 U.S. at 18; the reapportionment plan enacted by the city council is not a court-ordered reapportionment scheme reviewable under the "unusual circumstances" test applied by the court of appeals; and the plan is reviewable only to the extent that

[1] In Texas a home rule city such as the City of Dallas derives its powers not from the Legislature, but from the Home Rule Amendment, Article XI, Section 5 of the Texas Constitution, adopted in 1912. *Lower Colorado River Authority v. City of San Marcos,* 523 S.W.2d 641, 642 (Tex.Sup.Ct. 1975). Home rule cities in Texas have been held since that time to have "full power of self-government, that is, full authority to do anything the Legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the Legislature not for grants of power to such cities but only for limitation on their powers." *Forwood v. City of Taylor,* 147 Tex. 161, 214 S.W.2d 282, 286 (Tex.Sup.Ct. 1948). The record suggests no statutory limitation upon the authority of the City of Dallas to adopt a municipal election plan.

it must conform to the "clear commands of the Equal Protection Clause." Neither the court of appeals nor the district court has held that the City's use of at-large voting violates the Equal Protection Clause, and the court of appeals erred in reversing the judgment of the district court.

The court of appeals by its decision in this case has effectively eliminated the distinction drawn by this Court between court-ordered and state-initiated reapportionment plans and has failed to notice and apply this Court's decisions limiting review of state-initiated reapportionment plans to the clear commands of the Equal Protection Clause. This decision of the court of appeals has caused every legislature and political subdivision within the Fifth Circuit to be subjected to a standard never sanctioned by this Court and clearly in conflict with this Court's prior decisions, and the writ should be granted to resolve that conflict.

2. The court of appeals has held, contrary to prior decisions of this Court, that the effect of the City's reapportionment plan on Mexican-American voters cannot be considered absent an adjudication that the voting rights of Mexican-American voters have been unconstitutionally impaired.

This Court has held that multi-member districts and at-large elections do not per se violate the Equal Protection Clause, *Whitcomb v. Chavis,* supra, 403 U.S. at 142 (1971), and the incorporation of at-large voting in a state-initiated remedial apportionment plan does not violate the "clear commands of the Equal Protection Clause" unless the use of at-large voting invidiously cancels out or minimizes the voting strength of racial groups. *White v. Regester,* 412 U.S. 755, 765-766 (1973). A successful equal protection challenge moreover must be based on findings in a particular case that a plan in fact operates to dilute

the voting strength of an identifiable element of the voting population. *Dallas County v. Reese,* 421 U.S. 477, 480 (1975), *Whitcomb v. Chavis,* supra, 403 U.S. at 144.

This Court also has declared that the permissible use of racial criteria in legislative reapportionments is not confined to eliminating the effects of past discriminatory districting or apportionment. *United Jewish Organizations v. Carey,* ____U.S. ____, 97 S.Ct. 996, 1007, 51 L.Ed.2d 229, 243 (1977). The Court similarly held, in *Gaffney v. Cummings,* supra, 412 U.S. at 752-754 that a legislative reapportionment was not invidiously discriminatory simply because districts were based upon a principle of "political fairness" designed to perpetuate an approximately proportional representation of the Republican and Democratic parties. Although there had been no judicial determination that the voting rights of Republicans or Democrats had been impaired unconstitutionally, the Court held valid a reapportionment based upon proportional representation of political parties, saying ". . . neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the state." Id., 412 U.S. at 754.

The district court in the instant case, having found the city council's plan constitutional, declared that Mexican-Americans in Dallas "do not suffer from present dilution of their voting strength", *Lipscomb v. Wise,* supra, 399 F.Supp. at 793, Appendix B, infra, p. B-19, and made extensive findings of fact which support its ultimate conclusion that the incorporation of

at-large voting into the plan would enhance the opportunity of Mexican-American voters to participate in local electoral politics. *Lipscomb v. Wise*, supra, 399 F.Supp. at 793-794, Appendix B, infra, p. B-19. The court of appeals did not purport to determine the constitutionality of the council's plan but disregarded the findings of the district court because the district court had not found any unconstitutional impairment of Mexican-American voting rights. *Lipscomb v. Wise*, supra, 551 F.2d at 1047, Appendix D, infra, p. D-7.

There is no finding in this case that the partial use of at-large voting dilutes the voting strength of any identifiable element of the voting population; therefore there could be no valid basis for a determination by the court of appeals that the plan violates the Equal Protection Clause. *Dallas County v. Reese*, supra, 421 U.S. at 480.

The conclusion of the court of appeals that the voting rights of Mexican-Americans cannot be considered absent a finding of unconstitutional dilution is directly contrary to this Court's decisions in *United Jewish Organizations v. Carey*, supra, and *Gaffney v. Cummings*, supra, and cannot serve as a basis for invalidation of the council's plan under any standard of review.

The decision of the court of appeals is in conflict with decisions of this Court insofar as the decision of the court of appeals purports to require an adjudication of unconstitutionality as a prerequisite to recognition of the voting rights of any identifiable group, and the writ should issue to resolve that conflict.

3. The court of appeals has invalidated the State's use of at-large voting based upon the need for representation of a city-wide perspective in municipal government, even though neither the

district court nor the court of appeals found that such use of at-large voting would minimize or cancel out the voting strength of any identifiable segment of the voting population.

This Court has approved local government apportionment plans which utilize at-large representation, *Dusch v. Davis*, 387 U.S. 112 (1967), cf. *Dallas County v. Reese*, supra, and has indicated that representation of city-wide views may form a rational basis for the use of multi-member districts. *Chapman v. Meier*, supra, 420 U.S. at 20 n. 14.

The district court found that the city council's constitutionally permissible preference for partial at-large representation was based on the council's responsibility for policies which affect the city as a whole, as well as those which affect geographic or demographic segments of the city, and that a non-sectional viewpoint is desirable in matters such as zoning, formulation of the budget and urban land use planning. *Lipscomb v. Wise*, supra, 399 F.Supp. at 794, Appendix B, infra, p. B-21.

The court of appeals wholly disregarded those findings and did not purport to determine the validity of the City's interest in representation of a city-wide perspective on the council. The court of appeals nevertheless declared the council's plan invalid, although there are no findings of fact on which to base such a determination. See *Dallas County v. Reese*, supra, 421 U.S. at 480.

The court of appeals by its invalidation of the council's plan without a finding of invidious discrimination has rendered a decision in conflict with this Court's decision in *Dallas County v. Reese*, supra. The court of appeals by its disregard of the City's preference for at-large voting in response to the need for a city-

wide perspective has rendered a decision in conflict with this Court's decisions in *Dusch v. Davis*, supra, and *Chapman v. Meier*, supra, and the writ should issue to resolve these conflicts.

CONCLUSION

Petitioners pray that this petition be granted and that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Joseph G. Werner, a member of the bar of the Supreme Court of the United States, certify that copies of the foregoing petition were served on James A. Johnston, Esq., Sylvia M. Demarest, Esq., Edward B. Cloutman, Esq., Walter L. Irvin, Esq., and George Solares, Esq., Attorneys for Respondents, on this the 6th day of October, 1977, by placing in a depository of the United States Postal Service three copies of the petition, with first class postage prepaid, addressed to each of the attorneys named above at his or her post office address, in compliance with U.S. Sup. Ct. Rule 33(1), (3)(b).

.....
JOSEPH G. WERNER

APPENDIX A

(1) Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596.

> "1. All powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and four commissioners, who together shall be known and designated as the board of commissioners, all of whom shall be elected by the qualified voters of the city at large, and shall devote their entire time to the service of the city."

(2) Charter of the City of Dallas, 1931, ch. III, sec. 9, at 16:

> "Section 9. Except as otherwise provided by the Charter of the City of Dallas all powers conferred on the City shall be exercised by a City Council to be composed of nine members, nominated and elected in the manner hereinafter provided. The members of the City Council shall be elected by the qualified voters of the entire city, and they shall each be elected for a term of two years and until their respective successors shall have been elected and shall have qualified."

(3) Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4 at 19:

> "All qualified voters of the city shall be entitled to vote for one candidate for each 'place number'."

(4) City of Dallas Resolution Number 75-0207, sec. 1:

> "Section 1. That the City Attorney be, and he is hereby directed to notify the Judge of the United States District Court for the Northern District of Texas, Dallas Division, that it is the intention of the majority of this City Council to pass an ordinance, when prepared by the City Attorney, which will adopt the present eight residential districts as single member districts, with one individual Councilman to elected from each of the districts and living in the district, and with three individuals, including the Mayor, to be elected at-large with no residential requirements other than that the candidate live within the City limits of Dallas."

(5) Ordinance Number 14800 of the City of Dallas, sec. 2:

"Section 2. As a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7 and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11."

APPENDIX B

Albert L. Lipscomb, et al.
v.
The Honorable Wes Wise, Mayor of the
City of Dallas, et al.
Civ. A. No. CA-3-4571-E
United States District Court,
N. D. Texas,
Dallas Division
March 25, 1975.

MEMORANDUM OPINION

MAHON, District Judge.

This challenge to the present electoral system for the Dallas City Council has progressed a winding path to trial. Filed in 1971, the suit was originally dismissed for failure to state a claim upon which relief could be granted. On appeal, the Fifth Circuit remanded with clarification of what plaintiffs' burden would be in these circumstances. *Lipscomb v. Jonsson,* 459 F.2d 335 (5th Cir. 1972).

I.

Plaintiffs originally purported to represent the black population residing within an identifiable area of the City of Dallas, but prior to December 9, 1974, no order certifying this cause as a class action was entered. The Court originally began to hear testimony on this matter during the week of July 15, 1974. After approximately one and a half days of testimony, the Court, on its own motion, and out of an abundance of caution, suspended testimony pending resolution of the possibility that the matter might have been one of state-wide rather than local concern, and therefore appropriate for a three-judge court determination. The case was determined to be one appropriate for a single judge to hear, and the cause was reset for hearing for the

week of December 9, 1974.[1] On the day of the trial, the Court entered an order, certifying the matter as a class action; the class consisting of all blacks residing within the corporate limits of the City of Dallas. The order also denied a pending motion for leave to intervene on behalf of certain Mexican-Americans as parties plaintiff. This denial was the specific right of the proposed intervenors to participate in any subsequent hearing that may be held concerning the manner of appropriate relief if the present election system was held to be constitutionally defective. The order provided in part that:

> "It appeared that on the initial filing of this lawsuit on the 10th day of March, 1971, there were included as plaintiffs members of the Mexican-American Class and the action was on behalf of all the minority groups including the Blacks and Mexican-Americans who live within the City of Dallas. The defendants sought to elicit written interrogatories from all of the plaintiffs. Certain of the plaintiffs refused to respond to the interrogatories and upon contact by their counsel continued to refuse to respond. Included in this group were all of the Mexican-American Race originally included as plaintiffs in the lawsuit.
>
> Upon motion duly made and hearing had, the Court dismissed from the lawsuit all of those members of the plaintiff's class who refused to respond to written interrogatories. Included within this group were all those of Mexican-American descent.
>
> Prior to the entry of this Order the plaintiffs had amended their pleadings by their Second Amended Original Complaint and included in the Amended Complaint were both the Black and Brown citizens of Dallas. However, counsel determined that after all of the Mexican-American

[1] Tex. Const. Art. VI, § 3, Vernon's Ann.St., in essence provides that all qualified electors within a city shall have the right to vote for all elective officers of a city. *See also*, Tex. Const. Art. VI, § 3, and Vernon's Tex.Rev. Civ.Stat.Ann. art. 1175 (1963). *See however, State v. McAllister*, 88 Tex. 284, 31 S.W. 187, 189 (1895), which holds Tex.Const. Art.VI, § 3 not to be a bar to the election of city aldermen by wards. On July 22, 1974, Chief Judge Brown of the Fifth Circuit advised the Court that he had declined to constitute a three-judge court in this cause.

> plaintiffs were dismissed, and having no individual Mexican-American plaintiffs, that they could no longer represent the Mexican-Americans as a class and therefore urged the Court to consider this an action with the class being those Black citizens residing within the city limits of the City of Dallas.
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> After a portion of the case had been presented to the Court and the trial had been commenced and recessed, the intervenors filed their motion on July 16, 1974, for the purpose of intervening on behalf of the Mexican-American citizens in the City of Dallas. The testimony previously presented to this Court shows that this class represents approximately 8% of the population of the City of Dallas, the housing pattern is such that they are spread throughout the city limits of Dallas and are not a predominant factor in any concentrated census tract groups, and in view of these facts, the Court is of the opinion that to allow the intervention at this time would result in many difficulties in the management of this case as a class action and it would result in a delay that would possibly take the case beyond the time of the City Council election and the time that candidates need to file their candidacy. Moreover, the Court is of the opinion that to permit this intervention at this late hour would not assist the Court in resolving the issue of the constitutionality of the present at-large system."

After this order was entered, testimony was resumed on the question of whether the existing manner of electing members of the Dallas City Council was constitutional. On January 17, 1975, the Court found the present system of electing members to the Dallas City Council constitutionally infirm. Dallas was afforded an opportunity to come forward with an apportionment plan which would meet constitutional standards and testimony was heard on the merits of the city's proposal the week of February 4, 1975. Testimony at the remedy stage took over two days.

II.

This suit is not the conventional one person one vote reapportionment case; rather it is an attack alleging dilution of

the racial minority vote. The dilution is said to arise from operation of the at-large system of electing Dallas City Council which provides that every candidate for council run city wide, and face all the voters of the city. The Dallas City Charter requires that the city be divided into eight residential districts for City Council elections. Any person seeking election for any of the "places" on the ballot corresponding to the eight districts, must reside in the respective district. Three members, including the mayor, run without regard to any residence requirement. Voting for all eleven council seats is at-large, that is, on a city wide basis, regardless of the residency requirement. A majority of all votes cast for the councilmen, for the place for which the person is running, is required for election.

Dallas adopted its present council/manager form of government in 1931. Prior to that time it had a commission form of government, but since at least 1907, members of the city government have been elected on an at-large basis.

The number of positions on the City Council has been enlarged from time to time, the latest change being in 1968 when, by charter amendment it was increased from nine to the present eleven seats. The City Council elects from among its members two councilmen to hold the positions of Mayor Pro-Tem, and Deputy Mayor Pro-Tem. As noted above, all positions to council are elected by vote of the entire city.

The alleged dilution of the black citizens' vote was said to have its genesis in the racially segregated housing pattern present in the City of Dallas. Plaintiffs' uncontradicted evidence showed the existence of what was variously called a minority or inner city area. The characteristics of this geographical area were developed by use of United States Census demographic data and the area was described as being more or less continguous, extending from the city's South side, north to the city's central business district, curving northwest across the business district to the city's Love Field area. Within this area are located some

forty-odd standard statistical community census tracts as defined by the United States Census Bureau. Plaintiffs' experts gave testimony concerning the racial and socio-economic composition of the minority area and offered exhibits in summary. The black population of Dallas is 210,227.[2] The evidence shows that the minority area contains a black population which is 90% of all residents in the area. This means that nine out of every ten residents are black, of all the black residents in the city of Dallas, 93% reside within this area; of all the black residents of Dallas County, 95% were shown to reside here. In addition to the distinct racial composition of the inner city area, other characteristics were shown. A less desirable rating on many economic indicators of well-being were shown to exist here. For example, housing was shown to be generally of less value and of lower quality in the inner city area. The median grade level of schooling attained by residents of this area was shown to be less than for the non-minority areas. Unemployment was higher. Median income was lower. In general socio-economic indicators purporting to show "quality of life" were less favorable when compared with other areas of Dallas.

The voting patterns of the inner city area in relation to the voting patterns of the rest of the city with regard to elections for City Council positions were examined. The testimony was concerned with who carried the black area and how that candidate fared in the city elections at large. Examples from five elections demonstrate the pattern which emerged from this testimony. The first two elections concern place three for the subsequent elections years of 1959 and 1961. The 1959 election presented a black vs. white contest. The black candidate in that election polled some 87% of the votes from the above-described inner city. His white opponent polled some 73% of the vote from the non-minority area. The result, when translated into vote totals, gave the white candidate a 65% total of all votes cast and

[2] United States Census Data, 1970. Unless otherwise stated 1970 census data is used for all population and percentage figures.

made him the election winner. The 1961 election pitted a black against two white opponents. Here, the black candidate played the role of spoiler, forcing a run-off between his two white opponents. In the first election the black candidate garnered 81% of the black area's votes. In the white areas he gathered a scant 15%. The relative percentages left him as low man in the three-way race and eliminated him from the run-off. In 1965, the place eight election is illustrative of the pattern. This was a two-way race, black versus white. The black candidate carried the black area with 86% of the vote; the white candidate carried the white area with 75% of the vote. The total vote percentage gave the white candidate 62% making him the winner of the election. In 1969, the place ten race was three-way involving one black against two whites. The black carried the black area with 42%. The two whites (together) pulled about 83% of the white area's vote. No run-off was necessary however because here one of the whites received 59% of the total votes within the city. The 1971 election showed a corollary situation for place ten. Here, two black candidates ran against a single white candidate. Together the black candidates received 60% of the black area vote. The white candidate received 68% of the vote from the white areas, which was 63% of the city wide total. This, of course, made him the winner without the necessity of a run-off.[3] The Court feels that it is this voting pattern which is the key factor to understanding the dilution present in Dallas.

A description of Dallas political life would be incomplete without reference to the non-partisan slating groups. Like so

[3] The Court also notes that participation by the black community in the political processes of the city has generally improved in the past few years. In other areas, particularly, responsiveness of Dallas to minority concerns, improvement has been spectacular during this same period. The Court believes however that post litigation changes in these regards are similar to the argument that the electoral success of blacks forecloses dilution attacks. This contention has been specifically rejected as to any bearing on dilution itself. *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc). In evaluating the new plan which the city has presented, however, this improvement is of significance.

many large cities, partisan politics in the "party" sense of the word does not exist. The Republican and Democratic Parties simply do not field candidates. Instead, the politics surrounding Dallas City Council elections turn on the influence of slating groups. The slating group which has enjoyed dominance in the sense that it has been extremely successful in getting its candidates elected is the Citizens Charter Association (hereinafter C.C.A.). The C.C.A. has as its express goal the maintenance of good municipal government, specifically as embodied in the council/manager form. Testimony by one active participant in the affairs of C.C.A., an ex-president, gave insight into its functioning.[4]

C.C.A. has enjoyed considerable success with its candidates. Testimony shows that in the eight elections held since 1959, C.C.A. endorsed candidates have won in 82% of the races involved. This history shows that of seventy-five C.C.A. endorsed candidates, sixty-four triumphed at the polls. This is an 85% success rate.

The record affirmatively shows that since 1907 only two blacks have been elected to the Dallas City government. The first black to be elected was the present Mayor ProTem, Mr. George Allen. Mr. Allen testified for the plaintiffs in the first stage of the trial and for the City at the remedy stage. His testimony is that he was first elected to City Council in 1969, but only with C.C.A. support. This support was said to have been the result of a campaign bargain in the 1967 election to the effect that the black support for C.C.A. endorsed candidates would be linked to support for a Charter Amendment increasing the size of City Council from nine to eleven and that one of the two new seats

[4] Uncontradicted testimony shows that CCA is an election year phenomenon and is only concerned with Dallas council elections. During off election years the association has no permanent governing body or officer except the president. With the approach of a council election, the president initiates activity by naming various election committees which in turn hold meetings and select candidates. Historically, CCA grew out of a reform movement in the 1930's which was aimed at correcting abuses of the old commission form of government by infusing citizen participation into governmental affairs.

would go to a black person. This bargain was apparently kept by all parties. The Charter Amendment was passed, the size of the City Council was increased, and Mr. Allen was supported for a position by C.C.A. and won in 1969 with 71% of the vote. His opponent in that election was also a member of the black race. The other black person to be elected to City Council was also endorsed by C.C.A. Mrs. Lucy Patterson ran in an all black contest for place eight in 1973. She had a plurality in the general election and went on to win in the run-off with 53% of the vote total.[5]

The above-mentioned facets of the Dallas redistricting question must be viewed in an historical context. Dallas, located in the state of Texas, inherited by default some of this state's history of official race segregation. There is evidence, however, that Dallas also participated in this history of discrimination. However unpleasant it is to face that history, it cannot be avoided. Dallas' participation in that history is before the Court in large measure by stipulation of the parties. A review of those stipulations shows among other matters the following:

a. The original charter for the City of Dallas written in 1907 contained a section entitled "Segregation of the Races." This section was amended through 1952 and was carried forward as part of the charter until it was repealed in 1968. This section authorized the City Council to pass city ordinances providing the use of distinct blocks, for the housing, for amusement, for churches, for schools, by members of the "white" and "colored" races.

b. In 1937 the City Council passed on ordinance regarding separate spaces in commercial motor vehicles for white and black

[5] The racial composition of the present city council is two blacks (one male and one female); one Mexican-American (male) and eight whites (one of whom is female). The Court notes this composition as being more indication that circumstances have changed for the better since the institution of this lawsuit and while of not the quantity to overcome the Court's finding of dilution, these changes are again of consequence in considering the proper remedy in this matter. *See* note 2, *supra*.

passengers. A penalty was established for those who rode in spaces not designated for the race of the individual involved.

c. In 1942 the City Council adopted a resolution which enumerated the requirements which a taxi cab owner must have met before the cab would be permitted to carry Negro passengers.

d. In 1961 the City Council agreed to contract for the engaging of ambulance service and burial of Negro paupers.

e. In 1973 the City of Dallas City Council recognized by resolution that there is "unequal law enforcement, dual justice and unequal treatment for the different segments of the community and different races." There are other similar ordinances included by stipulation but these four will suffice for example. There was additional testimony from several witnesses concerning this history and the negative impact it made on the black community generally and specifically on the political life of that community.

Two currents make up the equal protection argument swirling around reapportionment cases. The original stream is the one person, one vote concept. This principle of equal protection is offended when some votes carry more weight than others. *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). One person , one vote came to Texas local governments in 1968. *Avery v. Midland County, Texas,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). Dilution is the other more recent current. This concept involves election schemes conceived or operated as devices to further racial discrimination and a corresponding lesser degree of opportunity to participate in the political process. *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). The Supreme Court in recognizing that multi-member districts inherently apply the one man, one vote concept, stated that circumstances of a particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population. *Whitcomb v. Chavis, supra,* citing *Burns v. Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16

L.Ed.2d 376 (1966); *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). The Fifth Circuit panel reviewing the initial dismissal of this case on appeal outlines several factors by which plaintiffs could show lack of participation in the political process of the life of Dallas. *Lipscomb v. Jonsson,* 5th Cir., 459 F.2d 335 (1972).[6] Since that appeal, the Supreme Court has given additional guidance to the circumstances which have a bearing on the opportunity to participate. In *Graves v. Barnes,* 343 F.Supp. 704 (W.D.Tex. 1972), *aff'd in part sub nom.; White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), Texas legislative reapportionment was under scrutiny. *White* noted that the Supreme Court had entertained claims that multi-member districts were "being used invidiously to cancel out or minimize the voting strength of racial groups . . . [and] to sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White, supra,* 412 U.S. at 766, 93 S.Ct. at 2339, 37 L.Ed.2d at 324. Looking at this standard, the Supreme Court observed several factors upon which the three-judge court had predicated their holding that the existing scheme was invalid. Among these factors was the history of official race discrimination which at times touched the right of Negroes to vote. Other factors included the number of blacks elected under the existing scheme and the correlation between the endorsement of the white dominated slating organizations and electoral success. *White, supra,* at 755, 93 S.Ct. 2332, 37 L.Ed.2d at 324-25.

[6] These factors include a showing that minority residents are frequently ignored in selection of candidates; slating group operation combined with a high correlation between endorsement and election, and the high cost of city-wide campaigning. *Lipscomb v. Jonsson,* 459 F.2d 335, 339 (5th Cir. 1972).

Plaintiffs' ultimate claims in the case *sub judice* reduce to the question of whether or not the electoral scheme for the Dallas City Council operates to minimize or cancel out the voting strength of racial elements of the voting population. This question was considered with regard to a court approved apportionment plan involving a parish school board and police juries, wherein at large elections the juries were provided in a Louisiana parish where the so-called racial minority commanded a majority of the entire parish population. The Fifth Circuit stated that the proper measure for measuring dilution of minority voting strength is not population but rather access to the political process. *Zimmer v. McKeithen,* 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc). The Court reviewed the Supreme Court decisions dealing with dilution or restriction to access and highlighted the various factors which could contribute to the showing of the fact of dilution. Included among these factors are:

1. a lack of access to the process of slating candidates;

2. the unresponsiveness of legislators to particular minority concerns;

3. a tenuous governmental policy underlying the preference for at large districting;

4. the existence of past discrimination in general which would preclude effective participation in the election system. *Zimmer v. McKeithen, supra,* at 1305.

Two recent cases by the Fifth Circuit illustrate some ramifications of dilution. In *Robinson v. Commissioner's Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974); a panel of the Fifth Circuit considered dilution in the content of manipulation of district boundaries, i.e., gerrymandering. There reapportionment of the County Commissioner's Court was considered for a Texas county wherein whites comprosed approximately 75% of the population and blacks 25%. The major city in Anderson County is Palestine. The city's racial composition was 74%

white and 26% black. The greatest concentration of blacks within the county was within one section of Palestine and 83% of the population of this section was black. In this section of Palestine approximately 26% of Anderson County's total black population resided. Anderson County is as are all Texas counties, divided into four precincts for the purposes of electing county commissioners. The redistricting scheme under scrutiny in Anderson County was drawn in 1969. It divided the black section of Palestine, Texas, into three separate precincts. In other words, the black community was segmented and divided for the purpose of electing County Commissioners. The panel upheld a district court finding of dilution. It was fragmentation of what was otherwise a "cohesive voting community" that was crucial to the finding of dilution. *Robinson v. Commissioner's Court, Anderson County, supra,* at 679.[7] In *Reese v. Dallas County, Alabama,* 505 F. 2d 879 (5th Cir. 1974) (en banc), the Fifth Circuit sustained a finding of dilution in an apportionment plan which did not involve race. Here the disparity was between rural and urban segments of the county's population. Dallas County, Alabama, is also divided into four districts for the purpose of electing County Commissioners. The district containing the City of Selma, Alabama, contained approximately half of the total population for the county. The three other districts divided the remainder of the population unevenly. The plan involved at large elections with a resident place requirement. In other words, for each of the four districts, a candidate for that district place on the County Commissioner's Court must reside within the district, although he was voted on at large. All voters of Dallas County, Alabama, vote for all four

[7] The trial court in *Robinson v. Comm'r Court, Anderson County, supra,* apparently found that the dilution present in that case was the result of a purposeful scheme "designed precisely to dilute the black vote . . ." This Court stresses that in the case of the City of Dallas that there has been no evidence of any design or purposeful intent to dilute the vote of any of its minority citizens. Rather, it is in the operation of the exclusive at-large election plan in combination with the existence of a historical pattern of discrimination which supports the finding of dilution

commissioners and only one of the candidates residing in each district can be elected. With this election scheme, dilution was found with regard to the urban voters of Selma. The Selma voters were "forbidden to elect resident commissioners in proportion to their numbers . . . Unlike residents of Selma the other voters in Dallas County [Alabama] can choose their proportional share of the representative body, from among . . . candidates who can . . . be expected to share their interests." *Reese v. Dallas County, Alabama, supra,* at 883. In other words, the scheme involved a minimizing or cancelling out the voting strength of a group that had an identifiable set of common interests. In *Reese,* the groups with an identifiable set of common interests were divided along rural and urban lines. In the instant case the landmarks of the set of common interest are racial.

From these two cases it can be seen that the fact of dilution can be present in a variety of voting schemes, even when the one person, one vote concept is adhered to. Dilution was found with single-member districts when a concentrated group with common interests was split up diffusing its strength over three districts. *Robinson v. Commissioners Court, Anderson County, supra.* Likewise, in *Reese,* with an at-large scheme, dilution occurred where candidates were required to be residents of unequally populated districts and the districts had obvious distinctions in "identifiable sets of common interests." *Reese v. Dallas County, Alabama.*

Based on these standards, it is clear that the present system of requiring all members of the Dallas City Council to run at-large on a city wide basis involves dilution. In this regard, the Court believes that two factors are of particular significance. These are the existence of past discrimination in general, which precludes effective participation in the electoral system and a customary lesser degree of access to the process of slating candidates than enjoyed by the white community. These factors are crucial when viewed in the historical context of the city and state.[8]

[8] *See,* however, notes 2 and 4, *supra.*

The mere existence of a definable minority area wherein some 90% of all black residents in the city live, the Court believes, is itself a lingering effect of past official race discrimination. There appear to be other lingering effects and these include the lesser degree of opportunity available to black residents to meaningfully participate in the election process in the City of Dallas. This lesser degree of opportunity is best shown by the voting pattern I have found to exist for the city:

> Black voters, that is, those residing in the inner city area, vote for black candidates, giving them at least a plurality, and usually a majority of their votes, and the white community, the non-minority voter tends not to vote for the black candidates.

This is dilution. In other words, when all members of the city council are elected at large, the significance of this pattern of blacks carrying their own areas and yet losing on a city wide basis is that black voters of Dallas do have less opportunity than do the white voters to elect councilmen of their choice. Another shadow of dilution is found in the high correlation between endorsement by the C.C.A. and victory city wide. Meaningful participation in the political process must not be a function of grace, but rather is a matter of right. *Graves v. Barnes*, 343 F.Supp. 704, 726 (W.D. Tex. 1972), *aff'd* in part *sub nom. White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed. 314 (1973).

The Fifth Circuit in *Zimmer v. McKeithen, supra,* noted several factors to be considered in establishing dilution. As noted above, one of those factors is responsiveness of legislators to particular minority concerns. Dallas presented much evidence on the city's *present* responsiveness. It is the Court's view that if present responsiveness of the city to the particular interests of the black community (or for that matter the brown or white communities), were the sole issue which determined dilution, then I have little doubt that there would be no finding of invidious discrimination. There has been ample demonstration of the fact that Dallas is acting for the needs of all its citizens—

parks, street services, police and fire protection, transportation, equal employment opportunity, fair housing and community relations. In these areas and more I find the city to be acting in a responsible manner—in a responsive manner. This present responsiveness, however, is not enough to justify the present exclusive at-large voting plan when weighed against the other factors which I have found.

III.

On January 17, 1975, I made preliminary oral findings of dilution which rendered the exclusively at-large system of voting unconstitutional. After being given time to consider its legislative responsibilities, the city offered its plan and plaintiffs in response, offered two proposals which they felt would be an effective remedy for the dilution which the Court had previously found. The Mexican-American intervenors as permitted by the Court's order of December 7, 1974, participated in this hearing and elicited testimony as to the effect that the city's plan and the plaintiffs' two plans would have on the Mexican-American voting population of Dallas. Additionally, evidence was heard on behalf of some dissenting members of plaintiffs' class who supported the general concept of an exclusive single-member district plan, but disagreed with the implementation of this concept as exemplified by plaintiffs' two proposals.

The election scheme presented by Dallas is a combination, single-member district and at large voting plan. It provides for eight single-member districts and three at-large positions including the mayor (hereinafter sometimes called "city's plan" or "eight/three plan"). The eight council persons elected from the respective eight single-member districts must reside within the district they represent and are to be elected by a majority vote of the residents of their district. The three at large seats have no residency requirement and are elected by a majority vote of all votes within the entire city. One of the at-large council seats is designated as mayor. The district boundaries are essentially the

same as the resident district boundaries under the exclusive at-large voting plan.[9] Plaintiffs presented two alternative plans. Their Plan D provides for ten single-member districts and a mayor who would be elected at large. Each council person would reside in and be elected by a majority vote of his respective district. The mayor would have no residency restriction (hereinafter "ten/one plan"). Plaintiffs' alternate plan provides for each of the eleven council members to be elected from a district and would have the mayor selected by the council members themselves from one of their number (hereinafter "eleven/zero plan").

The Court considered each of the three plans presented, with the spirit of the Supreme Court's mandate in *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) in mind. That is, that reapportionment is primarily the responsibility of state legislative bodies and not the federal courts. In the case at bar, an existing method of electing city council was found to be constitutionally defective. That plan was declared invalid and this Court then gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan. I find that it has met that duty in enacting the eight/three plan of electing council members.

The initial question encountered when considering the city's plan, is whether or not *any* plan providing for some at-large voting would, under the circumstances of this case, pass constitutional muster. This is especially true when it is features of

[9] The population variance of the eight districts is not in issue here. The district boundaries were redrawn in 1972 partly in response to this litigation. Plaintiffs' original claims included allegations of unproportional districts and population inequality. After the City Council redrew the district lines plaintiffs subsequently abandoned these contentions. The Court finds that there is substantial equality of population among the eight districts presented by the city's plan. Upon its initial presentation to the Court, the city's plan met objection as to the lack of precision in district boundaries. The city subsequently tendered its plan with modifications to meet these objections. See, defendant's exhibit No. 95 showing census tract composition of districts and defendant's exhibit No. 96 showing so-called field note description of boundaries.

the at-large scheme which contributed to the initial finding of dilution. The starting point for such an examination is the observation that while single-member districts are not constitutionally mandated as such, they are definitely the preferred approach. *Chapman v. Meier, supra; Connor v. Johnson,* 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed2d 268 (1971). This preference may yield, however, where particular circumstances justify a variation. The particular circumstances which would justify such a variation are twofold. The first situation is where "significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements . . . "*Zimmer v. McKeithen,* 485 F.2d 1297, 1308 (5th Cir. 1973) (en banc). The second situation contemplates use of multi-member (or at-large) districts where they "afford minorities a greater opportunity for participating in the political process. . . . "*Zimmer, supra,* at 1308. I conclude that the city's plan falls squarely within the second situation suggested by the Fifth Circuit in *Zimmer, supra,* and permeates to a large extent the first area of circumstances described therein. This conclusion is based upon a consideration of the impact that any plan would have on the Mexican-American citizens of Dallas, intervenors in this cause,[10] and the legitimate governmental interest to be served by having a city-wide viewpoint on the City Council. *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *Fortson v. Dorsey,* 379 U.S. 433, 437-438, 85 S.Ct. 498, 13 L.Ed.2d 401, 404 (1965).

The Mexican-American population of Dallas is

[10] Mexican-American intervenors presented no plan as such, which in their view would alleviate their situation. Generally, they supported the single-member district concept, but testimony clearly showed that in order to have a single-member district plan in Dallas wherein Mexican-American citizens constitute a majority in a single-member district at least twenty districts would be required. Other suggestions included some form of cumulative voting for council seats, concentric districts around the city and noncontiguous council districts. The Court believes that these suggestions are completely void of merit and would do nothing constructive for either the political interest of minorities or the constitutional interests of all citizens of Dallas.

approximately 67,073, representing some eight to ten percent of the total. The 1970 census data reflects the eight percent figure. Testimony by plaintiffs' expert and others indicate that Mexican-American census data tends to be understated for a number of reasons, primarily because of the lack of precision in determining who is a Mexican-American.[11] Undisputed is the fact that the Mexican-American citizens are diffused and spread out through all areas of the city. In their case, geographic assimilation has been in large measure achieved. Within the limits of Dallas there are only four census tracts which have a majority Mexican-American population, that is, over fifty percent. The testimony shows that Mexican-Americans have, however, endured some amount of unofficial race discrimination, which has in the past existed in the State of Texas and the City of Dallas. Plaintiffs' expert testified in essence that Mexican-Americans are restricted in their access to the political process but that the restrictions here are to a lesser degree than that for blacks. Witnesses from the Mexican-American segments of the Dallas population, of course, said that the discrimination suffered by them was just as pernicious as any suffered by the black population. The dissenting plaintiff agreed that the Mexican-Americans have suffered some degree of political discrimination in the City of Dallas. The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution. In the case of the Mexican-American citizens, the restrictions involved are difficult to precisely evaluate because of the diffuse residence pattern of the Mexican-Americans throughout the city and the population totals involved. What is not difficult to ascertain is the fact that Mexican-Americans do have a significant interest in

[11] These are technical matters of census classification. For example, in some instances being a Spanish surnamed citizen is a basic standard; other considerations may be whether or not the person speaks Spanish in the home or whether Spanish is the native language of the person. Apparently, the totals used by the city even include a very small number of citizens who are of Puerto Rican origin.

the subject matter of this litigation and the Court finds that intervenors are an identifiable minority group with the constitutionally protected right not to be invidiously excluded from participation in the political life of Dallas. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314, 325-26 (1973). The restriction of access which is present for the Mexican-Americans is of a similar nature to that this Court has found to exist for the black voters of Dallas, but it differs in at least two aspects. In the case of black voters, one factor in establishing dilution was the operation of white dominated slating groups; for Mexican-American voters, any restriction of access caused by slating group operations in the at-large system would not be alleviated by the institution of exclusive single-member district voting, in and of itself. Additionally, the slating group operations, while in some respects restricting access for Mexican-American citizens, also permit them as a group to operate in a "swing-vote" manner and give them opportunity they might not otherwise have had. On balance, I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting. *Cf., Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975). This Court is unwilling to penalize the Mexican-American community for its successful efforts to date in assimilating to the degree they have into aspects of the life of Dallas.[12]

In an exclusive single-member district plan the Mexican-Americans must, because of their lesser numbers, form voting coalitions with either black or white voters; that is, because of their diffuse resident pattern, Mexican-Americans will always be a minority group with either a black or white majority. They are in a double-bind situation. The Court finds that an exclusive single-

[12] Compare this assimilation with the high concentration of black citizens residing in the inner city area. Testimony suggests that single-member district voting tends, in some cases, to amplify segregated housing patterns. It would be indeed ironic if a remedy for dilution of voting strength resulted in a major impediment to minority citizens enjoying their constitutional rights. *See*, page 5, *supra*.

member district plan would do nothing to increase the opportunity for Mexican-American participation in the political life of Dallas and might tend to decrease it. Because of the voting patterns in Dallas, i.e., black voters tending to vote for blacks, white voting for whites, the browns will invariably look to coalitions with either blacks or whites in order to maintain political viability. This is a political fact of life for the Mexican-American voters in the City of Dallas. I find that presently Mexican-Americans have to some degree entered into the policy-making structure of the C.C.A. and other slating groups, and have their voices heard on the highest levels of these organizations as well as within the city government. In other words, the Mexican-Americans have entered to some intent into the political life of Dallas through the present at-large system. At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time however, it is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters, that would be unavailable in an exclusive single-member district voting plan.

Significant interest of both black and Mexican-American segments of the voting popula' n will be advanced when the city's plan is implemented ight single-member districts will permit black voters a greater degree of access and participation in the political process of Dallas. Likewise, the eight single-member districts will, in combination with the three at-large positions, enhance the opportunity of the Mexican-American citizens of Dallas, to utilize their voting potential in a significant new way, while not undermining the degree of participation they have enjoyed under the exclusive at large voting plan. Mexican-American citizens will, under the eight/three plan, have a heretofore unavailable flexibility and greater opportnity to participate in the political life of Dallas. *Zimmer v. McKeithen, supra,* 485 F.2d at 1308. Any redistricting plan which did not

consider the interest of the Mexican-American community would be suspect from a constitutional point of view. Here we deal with two separate minority groups, each with a significant interest.[13] This interplay of district minority interest is markedly similar to the "singular combination of unique factors" which justified a multi-member apportionment plan in *Mahan v. Howell,* 410 U.S. 315, 333, 93 S.Ct. 979, 35 L.Ed.2d 320, 335 (1973).[14]

There is another consideration which supports some measure of at-large participation in Dallas municipal government. That is the need for a city-wide view on the part of council. The council has responsibility for policies which affect the city as a whole, as well as those which affect specific geographic and demographic parts. Several members of the present council and the present City Manager presented the view that having some members of the City Council elected on a city-wide basis would be desirable. This desire for some at-large seats was said to be because of the need for a non-sectional viewpoint in resolving matters such as zoning (the Council functions as a zoning appeal board), budgetary considerations (the Dallas City budget is formulated on a city-wide basis) and city planning. Concern was expressed that exclusive sectional or district voices being heard on these matters would be detrimental to the city's interest as a whole. The Court finds that these interests are of significance in considering any remedy which might be advanced. *Chapman v. Meier, supra,* 420 U.S. at 20, 95 S.Ct. 751. That there is some need for a city-wide interest to be maintained in the government of Dallas is admitted by plaintiffs in their presentation of the ten/one plan. Here, as noted before, one council seat, designated as mayor, is elected city-wide. The evidence is controverted on the point of

[13] *Compare Chapman v. Meier, supra,* 420 U.S. at 19, 95 S.Ct. 751 where there was no question of any apportionment plan affecting different minority groups differently.

[14] All factions in this lawsuit provided the Court with testimony from black, white and Mexican-American citizens in support of their particular plan(s).

whether or not the mayor of Dallas is merely a ceremonial mayor with essentially council duties. What is undisputed is that the mayor does have the same council duties as any other council member, and to that extent, he may be considered just a councilman. So it appears that it is merely a question of degree as to how much city-wide representation on these legitimate issues is to be present; three as with the city's plan, or one with the plaintiffs' ten/one plan. The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole; e.g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm.[15] *Chapman v. Meier, supra; Fortson v. Dorsey, supra.* Furthermore, as the Supreme Court has recognized, at-large representation may be of benefit to all persons of the area from which the particular legislator is elected. "[s]ince . . . [the] . . . tenure [of the legislator] depends on the county-wide [in our case city-wide] electorate, he must be vigilant to serve the interest of all the people in the county [city], and not merely those people in his home district." *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, 404 (1965). The case *sub judice* presents just this type of situation wherein at large representation will be of significant benefit because of the particular nature of the city-wide interest to be served.[16]

[15] Budget and services certainly do not stop at district boundaries. Other areas of particular concern for Dallas as a whole include downtown revitalization projects, convention business and airport services.

[16] The Court has found dilution of the black vote. This is not to say however, that black citizens have not, to a certain degree, made the at-large system work for them as have the Mexican-Americans. Within the framework heretofore described, black citizens of Dallas have entered into the political process. What the Court is attempting to avoid is approving any remedy which does not, on balance, enhance constitutional opportunities for all citizens of Dallas. The Court is particularly concerned with the prospect of district sectionalism which usually occurs in an exclusive single-member

The demographic pattern of the eight districts in the City's plan is:

Council District	Total Population	Population Deviation from Mean Average of 105,551	Percentage of Total Population Black	Mex.-Am.
1	105,599	+.00045	2.08%	7.63%
2	105,529	-.00020	25.90%	20.00%
3	105,759	+.00197	5.96%	7.00%
4	105,676	+.00118	3.63%	3.20%
5	105,433	-.00112	0.26%	10.60%
6	105,604	+.00050	73.60%	7.20%
7	105,353	-.00196	0.40%	5.00%
8	105,448	-.00098	87.30%	3.44%

There was some initial concern by the Court by the relatively high concentration of black voters in District 6 (73.60%) and District 8 (87.30%). This concern was directed to the question of whether this concentration presented cluster dilution.[17] It is relatively easy to find cluster dilution where it can be shown that district lines are drawn with a purpose or intent to racially discriminate. *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, 515 (1963); *Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, 515 (1964); *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L. Ed.2d 110 (1960); *Howard v. Adams County Board of Supervisors,* 453 F.2d 455, 457 (5th Cir. 1972).[18] In this case, however, the evidence is clear that racial gerrymandering was not the purpose or intent of the district lines formulated in 1972 and readopted by the city as a result of this litigation.[19] I find that the eight

district plan. The Court is convinced that no matter how many single-member districts are drawn in Dallas, black voters in all probability would never elect more than 25% of city council *so long as the present pattern of voting exists.* With all single-member districts and the present voting pattern, it would be possible for a majority of council to "freeze out" this 25% and for all practical purposes ignore minority interests. Some at-large seats will give all minority voters the capacity to function as a swing vote and have their voice heard. The present responsiveness of city council demonstrates that a politically aware council does not choose to ignore significant groups of voters when its electorate is the entire city. *Forston v. Dorsey, supra.*

[17] Compare with fragmentation dilution as presented in *Robinson v. Comm'r Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974).

[18] *See,* note 7, *supra.*

[19] *See,* note 9, *supra.*

districts of the city's plan follow natural and rational boundaries and that no gerrymandering is present. Generally, the boundaries of each district are major thoroughfares, rivers, creeks, or city limits. For example, a significant portion of the boundary between Districts 4 and 5 (two "white" districts) is Northwest Highway (Loop 12). Likewise, a good part of the district line between Districts 5 and 7 (again two white districts) is the G.C. & S.F. Railroad right-of-way. The Trinity River is the district line separating Districts 7 and 8 (a "white" and a "black" district respectively); the river also separates two "black" districts, 6 and 8. Finally, the boundary between Districts 6 and 7 (a "black" and a "white" district) is in large measure, White Rock Creek. The only possible factual situation presented by the evidence which could support a finding of racial intent in drawing district boundaries is the percentages of minority voters contained in each district. In this case I find that although the percentage of black voters contained in Districts 6 and 8 is somewhat high, the concentration in and of itself does ot amount to dilution of the black vote.[20] The Supreme Court encountered a similar situation in *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Plaintiffs in that case argued for a finding of racial intent in drawing boundaries and attempted to show that it "was impossible to have districts . . . [as presented there] . . . unless they were drawn with regard to race' . . ." *Wright v. Rockefeller, supra,* at 54, 84 S.Ct. at 604, 11 L.Ed.2d at 514. There were four districts involved in *Wright.* One was 94.9% white. One was 86.3% black and Puerto Rican and two were approximately 72%

[20] It is apparent that different district lines could be drawn under an eight/three plan to achieve different proportions of minority population. In fact, city council considered and rejected an alternative eight/three plan which gave black voters a majority in three districts (one with approximately 66%; one with 62% and one with 61%). There was some testimony on what constitutes a "safe" district, but this Court is not concerned with safe districts, only constitutional ones. *Whitcomb v. Chavis,* 403 U.S. 124, 156-60, 91 S.Ct. 1858, 29 L.Ed.2d 363, 383-85 (1971); *Turner v. McKeithen,* 490 F.2d 191, 197 n. 24 (5th Cir. 1973). This Court sees no impediment to council drawing different district boundaries after the next scheduled election and in fact, there may well be under Chapter 4, Section 5 of the Dallas City Charter, an obligation of council to periodically review district boundaries.

white. The Court held that the plaintiffs in that case failed to show that the district lines were a product of a "state contrivance to segregate on the basis of race. . . ." *Wright v. Rockefeller, supra,* at 58, 84 S.Ct. at 606. There has been much controverted testimony in the present cause over how best to draw district lines, whether with an eight/three, ten/one, or eleven/zero plan. Dallas presented testimony from citizens of the black and Mexican-American community saying that the city's plan was a plan which would allow minority access to the political process in a meaningful manner. Plaintiffs' witnesses sharply disputed this testimony. The dissenting plaintiff in turn offered evidence tending to show that both of plaintiffs' plans fragmented the vote of South Dallas, an area which had many unique and common concerns for the black community.[21] This testimony led the Court to fully comprehend that "there is no agreement on whether the political interest of a minority group are best maximized by an overwhelming majority in a single district, bare majorities in more than one district or a substantial proportion in a number of districts. . . ." *Turner v. McKeithen,* 490 F.2d 191, 197 n. 24 (5th Cir. 1973). I find that in Dallas, the constitutional as well as the political opportunity of both minority groups affected are best maximized by the city's plan. This Court is not constitutionally required to see that any particular number of "safe" seats are provided for either black, brown or white citizens of Dallas. What is required is an apportionment plan that does not dilute, minimize, or cancel out the voting strength of any group. *White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Any plan must provide for equal access to the political process for all citizens of Dallas. It is the duty of the city's

[21] Plaintiffs' expert is white and was severely criticized by the members of plaintiffs' class who opposed the ten/one and eleven/zero plans. The implication of the criticism was that plaintiffs' plans had concerns other than those of the black community or constitutionality in formulating district lines. *See, Robinson v. Comm'nr Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974), for an example of fragmentation of the black vote. The Court finds that the city's plan best preserves the integrity of the area known as South Dallas, which has an identifiable set of common interests.

legislative body to come forward with a plan that will provide this access, and I find that the City of Dallas has met its obligations in coming forth with its eight/three plan.

This Court believes what the Supreme Court has said time and time again in reapportionment cases regarding the responsibility of state legislative bodies to reapportion themselves. "[R]eapportionment is primarily the duty and responsibility of the state through its legislature or other body rather than of a federal court . . . ." *Chapman v. Meier, supra,* [citing *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Maryland Committee v. Tawes,* 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964)]. I cannot reemphasize this point too strongly. The Supreme Court in *Chapman v. Meier, supra,* remanded that cause with a high hope that the North Dakota legislature would accept its duty to enact a constitutionally acceptable reapportionment plan. Only then, if the legislature failed in that task, would the responsibility fall to the federal courts.

Testimony shows that the eight/three plan was not a hasty or ill-considered one. The Dallas City Council has had many redistricting plans before it in the last two or three years. Various citizen groups have had opportunities from time to time to voice their opinions on general types of apportionment plans. The members themselves have offered council several redistricting plans during the past two years. The Court finds that the city's plan was merely one of many which has been before the City Council for some time, and not one which was hastily conceived merely for the purposes of this litigation.

The Court is not unmindful of its role in apportionment cases. Absent particularly pressing circumstances justifying at large voting schemes, I would not hesitate to approve only single-member districts. *Connor v. Johnson, supra.* This would be especially true if there had been no history of at-large voting in Texas and in Dallas. I find, however, that at-large voting,

especially on the municipal level has been an integral part of Texas local governments and that at large voting schemes have their genesis in reasons other than those racially motivated. In other words, this Court is not forcing at-large voting on the citizens of Dallas with its acceptance of the eight/three plan because Dallas has had at large voting since at least 1907.[22] There is a preference for single-member districts in considering for constitutional purposes apportionment plans. However, at-large plans have never been declared constitutionally invalid *per se. Connor v. Johnson,* 502 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971); *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L. Ed.2d 363 (1971). I, too, decline to hold that a plan which provides for some at large representation is in itself constitutionally defective where it was only certain aspects of the city's exclusively at large plan which rendered it constitutionally impermissible. *Lucas v. Colorado General Assembly,* 377 U.S. 713, 731, 84 S.Ct. 1459, 12 L.Ed.2d 632, 644 n. 21. Those defects are eliminated by the city's eight/three plan. In Dallas, under the factual situation presented here, neither all single-member districts or exclusive at-large voting offers the balance which is necessary so that all citizens may have equal opportunity of access to the political process. Both plans offer advantages to each minority group as well as to the white majority. The eight/three plan allows the benefits of both schemes without the potential for mischief which is present under each exclusive plan.

At the close of testimony on February 8, 1975, I made findings which approved the city's plan as constitutional. Accordingly, I ordered that the eight/three plan as had been offered by the city, be instituted in time for the April 1975 city council elections, and that the election proceed on the scheduled date. Upon request from the City, the Court modified those provisions of the Dallas City Charter which provide that council candidates have

[22] Compare, *Chapman v. Meier, supra,* where the District Court formulated its own plan for the North Dakota legislature and that state had no tradition for multi-member districting.

petitions containing signatures from three hundred individuals qualified to vote for the proposed candidate, to allow petitions containing signatures from any three hundred qualified voters residing in the City of Dallas be sufficient for candidacy. This modification for the April 1975 election only.

On February 21, 1975, plaintiffs filed their motion for attorney's fees and costs. This motion was later supported by appropriate affidavit and on February 27, 1975, attorneys for Mexican-American Intervenors filed their motion on this matter. The City of Dallas filed its opposition to these motions on March 14, 1975. The Court has the matter of attorney's fees under advisement and will make its ruling in a supplement to this opinion.

ORDER

The Court has previously declared the City of Dallas' exclusively at-large voting scheme for Dallas City Council constitutionally invalid and approved a combination single-member district, at large voting plan. The combination plan was initially proposed by defendants as members of the Dallas City Council, after the Court afforded them an opportunity to do so. On March 25, 1975, findings of fact and conclusions of law were entered by the Court. That opinion and order is adopted and incorporated for all purposes in this order concerning attorneys' fees and costs. In the March 25, 1975, opinion I kept under advisement the matter of attorneys' fees and costs. Now, having reviewed the entire record in this matter and considering the briefs of the respective parties I conclude that certain costs should be allowed plaintiffs and that an award of attorneys' fees is inappropriate and will not be allowed.

Plaintiffs and Intervenors moved for an award for attorneys' fees and costs initially contending that they were entitled to such an award under two theories.[23] First, because they were vindi-

[23] Intervenors, representing the Mexican-American citizens of Dallas participated only in the remedy phase of this cause after the old exclusively at large voting plan had been declared invalid. *See*, this Court's Order of March 25, 1975.

cating significant rights for the citizens of Dallas in eliminating an unconstitutional voting scheme, they were acting as private attorneys general and thus entitled to an award. And, second, an award is proper because of the defendants' bad faith in the conduct of this litigation.

The private attorney general theory has of course been recently foreclosed. In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court extensively reviewed the conceptual and historical structure for awards of attorneys' fees under the private attorney general theory, and concluded that in the absence of a specific statute, it would be improper for the District Court to award attorneys' fees on this basis. Significantly, the Supreme Court expressly disapproved the authorities sustaining private attorney general awards. These authorities are of course the same ones originally cited by movants in support of their motion.[24] Plaintiffs now strongly advance the alleged bad faith of defendants to support an award of attorneys fees. There is no doubt but that a finding of bad faith or obdurately obstinant conduct on behalf of defendants would support an award of attorneys' fees. *Sims v. Amos*, 340 F.Supp. 691, 694 (M.D.Ala. 1972) (Three Judge Court) aff'd. *sub nom. Amos v. Sims*, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972). In this case however, I find there is simply no factual basis to justify a finding of bad faith.

This litigation has been complex and protracted. Conduct of defendants and their counsel was at all times exemplary and most helpful to the Court as the case developed over its numerous

[24] *Brandenburger v. Thompson*, 494 F.2d 885, 890-93 (9th Cir. 1974) (concurring opinion) is also of interest. Here, it was observed that the now disapproved of cases, which sustained an attorney's fee award predicated on a private attorney general concept, also had strong elements of bad faith present. In other words, these cases were saying although we don't need to find bad faith to award attorneys fees, we do find it present and thus will justify an award of attorneys fees on both concepts.

contours.[25] Very few of the matters before the Court were simple or easy to unravel. Many legitimate factual and legal issues were properly raised by defendants for consideration. None can be said to have been frivolous or completely without merit. Much of the factual framework developed at the first part of the hearing on the constitutionality of the old exclusively at large voting plan, assisted the Court in the remedy portion of this litigation. Defendants' contentions that the old plan met constitutional standards did not survive plaintiffs' attack. Many of these same contentions, however, supported the Court's later acceptance of the eight-three, mixed plan which was formulated by the City.[26] Failing to prevail does not amount to bad faith. Compare *Doe v. Poelker,* 515 F.2d 541 (1975), wherein the Court noted that the history of that litigation revealed a "wanton, callous disregard for the constitutional rights [of plaintiffs therein] . . . ."

The voting system of Dallas is established by the City Charter which was adopted by a majority vote of the voters of the City. Changes to the voting system necessarily are changes to the Charter and absent a judicial determination of unconstitutionality, such changes can only be effected by a Charter Amendment adopted by the voters.

It is a City Charter provision which was at issue here, not a mere ordinance. A majority vote of the registered voters of the

[25] This is not to detract from the conduct of movants in this suit. It is, however, defendants' bona fides which is now at issue.

[26] Council member defendants urged, as did Mexican-American intervenors in the remedy hearing, that any plan consider the needs of each distinct minority in the City. I feel that this attitude alone, negates any finding of bad faith on the part of defendants and tends to show the merits of the City's claim of responsiveness. *See also,* this Court's Order of March 25, 1975, at pages 16 and 22-23. This Court's finding of dilution was predicated largely upon the realities of housing and voting patterns existing within the City when viewed in an historical context. It is difficult to deny the past, and the defendants, I believe, recognized the past and defended on the basis of present responsiveness. While they did not prevail, I cannot say that the defensive positions were insignificant or advanced for dilatory purposes. As I have herein stated, I do not believe that merely losing on the merits necessarily implies bad faith.

City is required to change the Charter. The members of the City Council, cannot, on their own modify the Charter to alter the voting scheme. Council's role is to propose changes to the Charter by proposed amendment which in turn is approved or rejected by the voters of Dallas. In this context, after the initiation of this suit, in 1973, Council did propose a Charter Amendment which would have provided, *inter alia,* for an enlargement of Council and for a mixed, at large, single member district voting plan. This scheme of enlargement and modification of the voting system was overwhelmingly rejected by both black and white voters. From this factual vantage point, I do not believe that bad faith or obdurately obstinate behavior by defendants has been demonstrated in any way. If defendants had attempted to unilaterally change the voting plan, absent a vote of the people or a ruling from the court with proper jurisdiction that a provision of the Dallas City Charter was constitutionally invalid, they would have been acting unlawfully. Compare, *Sims v. Amos, supra,* and cases cited therein for examples of bad faith. In *Sims,* the Court noted that the history of that litigation was "replete with instances of the Legislature's neglect of and even total disregard for, its constitutional obligation to reapportion . . . ." *Sims v. Amos, supra,* 340 F.Supp. at 693-94. There as in other reapportionment cases the legislative body had the power and the obligation to reapportion. In the instant case, it is apparent that the Dallas City Council could not have lawfully changed the voting scheme on its own. It lacked the authority to do so. Where there exists a duty and the existing power of an entity to reapportion itself and that entity wilfully and repeatedly refuses to do so, as was evidenced in some legislative redistricting cases, I agree that those circumstances go far to establish bad faith. Where however there is an absence of inherent power to effect such an apportionment, different circumstances are presented. There is absolutely no basis for concluding that defendants have presented their case arbitrarily or capriciously. No racial

motivation or intent has been found. In such circumstances, no bad faith exists.

Advancing serious defenses and litigating contested facts is not bad faith. Defendants were in part unsuccessful in litigating complex issues. When the Court announced its finding of unconstitutionality, defendants were given the opportunity to come forward with a constitutional plan. They promptly submitted their mixed, at large, single member district eight/three plan. I have found that this plan meets constitutional standards. *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed. 2d 766 (1975). I believe that this presentation of a constitutional voting plan by City Council to be one more demonstration of defendants' good faith. *Wallace v. House,* 515 F.2d 619 (5th Cir. 1975) (concurring opinion).

Plaintiffs, having prevailed in their suit to have the old at large voting scheme declared constitutionally infirm are entitled to their costs as allowed by law. 28 U.S.C. § 1911 *et seq.* Rule 54(d), Fed.R.Civ.P. The following enumerated costs as shown on plaintiffs' Bill of Cost filed February 21, 1975, will be allowed.

Fees of the Clerk	$ 40.00
Fees of the Marshal	10.12
Fees and Disbursements for Printing	1,106.97
Fees for Witnesses	224.90
Fees for Exemplification and Copies of Papers	104.50
Costs Incident to Taking of Depositions	1,683.38
TOTAL	$3,169.87

The Court feels that the fees requested for plaintiffs' expert witnesses are not properly taxable. *Henkel v. Chicago, St. Paul, M. & O. Ry.,* 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386 (1932).

It is so ORDERED.

APPENDIX C

United States Court of Appeals
For the Fifth Circuit
October Term, 1976
No. 75-2605
D.C. Docket No. CA-3-4571-E

ALBERT L. LIPSCOMB, ET AL.,
Plaintiffs-Appellants
Appellees,

versus

THE HONORABLE WES WISE, Mayor of the City of Dallas, ET AL., ETC.,
Defendants-Appellees,

versus

ADELFA B. CALLEJO, ET AL.,
Intervenors-Appellants.

Appeals from the United States District Court for the Northern District of Texas

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants appellees and intervenors-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 9, 1977

Issued as Mandate: August 8, 1977

APPENDIX D

Albert L. Lipscomb, et al., Plaintiffs-Appellants Appellees,
v.
The Honorable Wes Wise, Mayor of the
City of Dallas, et al., etc.
Defendants-Appellees,
v.
Adelfa B. Callejo, et al.,
Intervenors-Appellants.
No. 75-2605.
United States Court of Appeals,
Fifth Circuit.
May 9, 1977.
As Modified on Denial of Rehearing
July 13, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court held that the constitutional validity of legislative apportionment schemes was a justiciable question because "[j]udicial standards under the Equal Protection Clause are well developed and familiar," 369 U.S. at 226, 82 S.Ct. at 715. Subsequent decisions establishing the principle of individual electoral equality, *see Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and applying the dilution doctrine, *see White v. Regester,* 412 U.S. 755, 93 S.Ct. 2342, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), have confirmed the Court's sanguine assessment of the judiciary's capacity to eliminate unfair treatment of voters as individuals and to enhance the prospects for effective political participation

by formerly disenfranchised racial minorities. A necessary concomitant to the formulation of constitutional principles governing the legality of particular types of apportionment plans has been the development of a federal common law of voting rights remedies. This appeal concerns such a remedy.

I. DALLAS CITY COUNCIL ELECTIONS

Three major racial groups make up the population of Dallas, Texas. Sixty five percent of Dallas' citizens are white; twenty five percent are black; and ten percent are Mexican-American[1] or chicano. Prior to the 1975 elections, the Dallas City Council was selected in the following manner. The City was divided into eight residential districts; eight "places" on the council ballot were reserved for candidates who resided in each of the respective districts; three additional Council members, including the mayor, ran without regard to the residency requirement; but voting for all eleven seats was on an at-large basis. The result of the residency requirement plus at-large voting for all seats was that even though candidates carried black districts by huge majorities they were regularly defeated by opponents who carried the majority white vote city-wide.

Candidates for the Dallas City Council have traditionally been nonpartisan. No party primaries have ever been held, although a majority-vote requirement has necessitated run-off elections whenever a candidate for a particular "place" obtains only a plurality of the popular vote. Crucial to success in the Council elections has been the endorsement of the Citizens' Charter Association (CCA); approximately eighty percent of the candidates supported by this slating group have been victorious. Since 1969, the CCA has endorsed at least one minority group candidate for a City Council position in the biennial elections. At

[1] We use interchangeable the term Mexican-American and Chicano to comprehend that group, largely of Spanish-surnamed citizens, mostly of Mexican origin. *See Hernandez, v. Texas,* 347 U.S. 475, 480, 74 S.Ct. 667, 98 L.Ed. 866.

the time the case was tried by the district court, two blacks and one Mexican-American were serving on the eleven-person City Council. All three had been supported by the CCA. No black or chicano had ever won a Council seat without CCA backing; few whites had, although Mayor Wise did win as an independent.

The district court has held that the at-large system of electing *all* Dallas City Council members unconstitutionally dilutes the voting strength of the black community of Dallas. *Lipscomb v. Wise,* 399 F.Supp. 782 (N.D.Tex. 1975). Mexican-Americans have also been recognized as an identifiable racial group for purposes of the fourteenth amendment, *see. e.g., Hernandez v. Texas,* 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed.866 (1954). But the district court's judgment here appealed from did not attempt to determine the constitutionality of the Dallas elections system with respect to chicanos, because all Mexican-American plaintiffs had been dismissed from the lawsuit for failure to comply with discovery orders. 399 F.Supp. at 784. Thus, for purposes of this appeal only, we must assume that no constitutional violation of the rights of Mexican-American citizens occurred under the at-large scheme.

II. PARAMETERS OF THE DISPUTE

The City of Dallas does not challenge the district court's holding that the all at-large system unconstitutionally diminishes the voting strength of Dallas' black citizens. The problem, instead is the selection of an appropriate remedy. The district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional. That plan, known as the "eight/three" plan, provides for the establishment of eight single-member districts corresponding to the eight residential districts under the all at-large system. The additional Council members are to be elected at-large, with one of the at-large seats being designated as mayor. The plaintiff-appellants contend that the district court's decision must be reversed because (1) it employs at-large voting to fill three

Council seats; and (2) the district lines have allegedly been drawn so as to concentrate black voters in an impermissibly small number of districts, resulting in "cluster dilution." Representatives of the Mexican-American community, whom the district court permitted to intervene at the remedy stage of the lawsuit, also appeal and ask that we remand for findings concerning alleged unconstitutional dilution of the voting strength of Dallas' chicano citizens and for the development of an election plan that would remedy that alleged violation.

We note at the outset two limits on our decision here. First, if the election plan proposed and formally adopted by the City Council is (1) constitutional and (2) otherwise in accordance with the federal common law of voting rights remedies, it should be approved. *See Burns v. Richardson,* 384 U.S. 73, 85, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Wallace v. House,* 515 F.2d 619, 634-35 (5th Cir. 1975) (*Wallace I*), *vacated and remanded on other grounds,* 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976), *on remand* 538 F.2d 1138 (5th Cir. 1976) (*Wallace II*). Second, it is concededly impossible that an eleven-member plan of any sort could be drawn for the city of Dallas which would create a "safe" single-member district for the Mexican-American community unless some form of cumulative voting, proportional representation, or crazy-quilt district boundaries were employed. Mexican-American citizens are so dispersed throughout Dallas that a safe single-member chicano district could be established only by increasing the size of the Council to twenty or twenty-two members. The largest concentration of Mexican-Americans in the City's plan for eight single-member districts is twenty percent of one district's population. Under the two alternate plans proposed by the plaintiffs, no more than thirty one percent of any district's population would be chicano. The Mexican-American intervenors themselves offered no proposed plans. This Court, on the facts of this case, has no authority to order the City of Dallas to double the size of its City Council. Therefore, as far as the effects of reapportionment on the Mexican-American community are

concerned, we are limited to the consideration of plans for an eleven-member Council.

III. THE PREFERENCE FOR SINGLE-MEMBER DISTRICTS

We have previously recognized Dallas' longstanding public policy in favor of at-large voting. *See Zimmer v. McKeithen,* 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc). It comes as no surprise, therefore, that the reapportionment plan proposed by the City is a "mixed" plan, containing eight single-member districts and three at-large seats. It cannot, however, be successfully maintained that the use of at-large voting to select three Council members is in itself constitutionally defective. *White v. Regester,* 1412 U.S. 755, 765, 93 S.Ct. 2342, 37 L.Ed.2d 314 (1973) (multi-member districts are not *per se* unconstitutional); *Chapman v. Meier,* 420 U.S. 1, 15, 95 S.Ct. 751, 760, 42 L.Ed.2d 766 (1975) (Court "has upheld numerous state-initiated apportionment schemes using multi-member districts").

Appellants contend that the district court's approval of the City's proposed reapportionment plan must be reversed as an abuse of discretion. This contention is founded on the Supreme Court's recent decision in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam). In *East Carroll,* the district court had approved a municipal plan calling for the at-large election of all members of a parish police jury and school board. This Court reversed on constitutional grounds, holding that the all at-large system unconstitutionally diluted the voting power of black citizens. *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc). The Supreme Court, however, expressly avoided disposition of the case on constitutional grounds. 424 U.S. at 639, 96 S.Ct.

1083. Rather, the Court affirmed our decision on the basis of the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances . . . . As the en banc opinion of the Court of Appeals amply demonstrates, no special circumstances here dictate the use of multimember districts. Thus we hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member reapportionment plan.

424 U.S. at 639-40, 96 S.Ct. at 1085; accord, *Paige v. Gray,* 538 F.2d 1108, 1111 (5th Cir. 1976); *Wallace v. House,* 538 F.2d 1138, 1142 (5th Cir. 1976)."

IV. THE MEXICAN—AMERICAN AS CREATING A "SPECIAL CIRCUMSTANCE"

Here, the district court approved the City's eight/three plan on the following basis:

> "I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting . . . . The Court finds that an exclusive single-member district plan would do nothing to increase the opportunity for Mexican-American participation in the political life of Dallas and might tend to decrease it. . . . [I]t is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters [which] would be unavailable in an exclusive single-member district voting plan. . . . Mexican-American citizens will, under the eight/three plan, have a heretofore unavailable flexibility and greater opportunity to participate in the political life of Dallas." 399 F.Supp. at 793-94.

Although a group of Mexican-Americans were originally plaintiffs in the district court, they were dismissed for failure to comply with discovery. 399 F.Supp. at 784. A class consisting of

Mexican-American voters were permitted to intervene at the remedy stage of the lawsuit, but the district court's finding of unconstitutionality concerned the voting strength of black citizens only. The intervenors presented no plans for reapportionment at the remedy stage. Their position can be fairly characterized as being in favor of any reapportionment plan that would create a "safe" Mexican-American seat on the Dallas City Council. Of course, no racial group has a constitutional right to be represented in a legislative assembly by a member of the group. On the other hand, representation by a person of one's own race is the most visible sign that a racial group has effective access to the political process and that the assembly will hear those concerns that are peculiar to the group. It is generally concluded that no single-member district will be dominated by chicanos, who comprise only eight to ten percent of Dallas' population and whose residences are not geographically concentrated. The question on appeal is therefore whether the particular situation of Mexican-American citizens in Dallas constitutes a "special circumstance" within the contemplation of *East Carroll* and our opinion on remand in *Wallace v. House*. We think it does not.

The major difficulty with the district court's decision that a mixed plan would improve Mexican-American access to the political process is that there has never been a determination that their access has been unconstitutionally impaired. At the liability stage of the trial, there was no evidence presented concerning the voting rights of the dismissed chicano plaintiffs. At the remedy stage, the Mexican-American intervenors suggested that the voting power of chicanos had been diluted in the same fashion as the voting power of the black community. The City did not oppose these assertions. (Indeed, they furthered the City's position.) The trial court was ambivalent:

"The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to dilution. 399 F.Supp. at 793.

I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting.
399 F.Supp. at 793.
Mexican-Americans have entered to some extent into the political life of Dallas through the present at-large system. At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time however, it is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters [which] would be unavailable in an exclusive single-member district voting plan."
399 F.Supp. at 794.

Thus, for purposes of this appeal, we must assume that the former all at-large system was not unconstitutional with respect to Dallas' chicano community. The problem that the chicano officer seeker faces in Dallas is that only eight to ten percent of Dallas' citizens are Mexican-Americans. In any election contest dominated by racial or ethnic block voting, a Mexican-American will always come in third to the white candidate and the black candidate. Chicano politics in Dallas must be the politics of coalition.

Furthermore, we find most enlightening on this matter of the relative advantages of eight/three and eleven/zero systems to Mexican-Americans a pleading filed on their behalf pending this appeal. The trial court expressly retained jurisdiction of the case for possible future modifications. Shortly after the trial court judgment an election was held at which a member of the class was defeated for one of the at-large posts. Thereafter, counsel for the Mexican-American intervenors filed a motion with the trial court for a further hearing as to the correctness of the trial court's order approving the eight/three city council. In support of this motion, counsel made the following statements:

"Intervenors would show the Court that under the approved 8

3 plan Mexican-Americans are restricted in their access from entering into the political life of Dallas. It is clear that At Large voting does not offer features which allow greater participation in the political process within Dallas for Mexican-American voters, but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningfully in the election process.

Intervenors would show the Court that the results of the election of April 1, 1975, and other additional evidence will establish that Mexican-Americans are being denied representation and do suffer from the present dilution of their voting strength and do not benefit to a significant extent from At Large voting."

Thus, it will be seen that by pleadings filed by them, a class for whose benefit the trial court sought to act, has not only disclaimed the "benefit" but also denied the basis of which it rests.

We conclude that (1) as far as this record is concerned, chicano "access" to the political processes of Dallas need not be improved since it is *ex hypothesi* the same "access" as that of white persons; and (2) the district court's opinion was based on a theory of electoral politics that applies as well if not better to single-member districts than to at-large elections. Thus, the situation of the Mexican-American voters does not constitute a special circumstance within the contemplation of the cases which require that absent such special circumstances, the city's legislative body be elected from single members districts.

V. ELECTION OF MAYOR

No showing has been made as to the city's preference for the election of a mayor[2] if the City is to operate with an eleven

[2] The mayor's office in Dallas is what is known as a "weak mayorality." That official merely presides over council meetings and represents the City. He has no legislative powers *qua* mayor. He has no veto powers. City government is administered by a City Manager.

member council chosen by districts. Under the present plan, he is required to be the city-wide candidate for "position" No. 11 of one of the at-large posts. The City may provide for the election of the mayor by general city-wide election or by election by City Council.

VI. CONCLUSION

Therefore, the order appealed from is reversed and remanded with instructions for the district court to require the City to reapportion itself into an appropriate number of single-member districts for the purpose of holding City Council elections. Should the City fail to propose an acceptable plan, the court shall formulate its own plan. The trial court shall also consider the appellant's claim here that he is entitled to attorney's fees for all services through the completion of this appeal. *See* 42 U.S.C.A. § 1988 (Supp. 1977).

REVERSED AND REMANDED.

APPENDIX E

LIPSCOMB V. WISE

Albert L. Lipscomb, et al.,
Plaintiffs-Appellants Appellees,
v.
The Honorable Wes Wise, Mayor of
the City of Dallas, et al., etc.
Defendants-Appellees,
v.
Adelfa B. Callejo, et al., Intervenors-Appellants.
No. 75-2605.
United States Court of Appeals,
Fifth Circuit.
July 13, 1977.

Appeals from the United States District Court for the Northern District of Texas, 399 F.Supp. 782, Eldon B. Mahon, Judge.

ON PETITIONS FOR REHEARING

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of plaintiffs-appellants appellees and intervenors-appellants in the above entitled and numbered cause be and the same are hereby DENIED.

The concluding paragraph of the opinion, 551 F.2d 1043, is modified to read as follows:

VI. CONCLUSION

Therefore, the order appealed from is reversed and remanded with instructions for the district court to require the City to reapportion itself into an appropriate number of single-member

districts for the purpose of holding City Council elections. Should the City fail to propose an acceptable plan, the court shall formulate its own plan. The trial court shall also consider the appellant's claim here that he is entitled to attorney's fees for all services through the completion of this appeal. *See* 42 U.S.C.A. § 1988 (Supp. 1977).

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 75-2605

Albert L. Lipscomb, et al.,
Plaintiffs-Appellants Appellees,
versus
The Honorable Wes Wise, Mayor of
the City of Dallas, et al., etc.
Defendants-Appellees,
versus
Adelfa B. Callejo, et al.,
Intervenors-Appellants.

Appeals from the United States District Court for the Northern District of Texas.

ORDER:

(X) The motion of APPELLEES for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

.....
United States Circuit Judge

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-149
WES WISE, ET AL.,
Applicants,
v.
ALBERT L. LIPSCOMB, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the responses filed thereto, and the reply of the applicants,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Fifth Circuit in case No. 75-2605, issued August 8, 1977 be recalled, and the judgment of that court stayed, pursuant to my in chambers opinion released today, pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to continue in effect pending the sending down of the judgment of this Court.

/s/ Lewis F. Powell
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of August, 1977.

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-149

Wes Wise et al., Applicants

v.

Albert L. Lipscomb et al.

On Application for Stay.

[August 30, 1977]

MR. JUSTICE POWELL, Circuit Judge.

This is an application for a stay of the judgment and recall of the mandate of the United States Court of Appeals for the Fifth Circuit. That judgment directs the District Court for the Northern District of Texas to require the exclusive use of single-member districts in the election of the Dallas city council. Applicants, the mayor and city council of Dallas, contend that any redistricting pending review by this Court could have the effect of mooting the case and defeating this Court's jurisdiction.

I.

Before 1975 the 11 members of the Dallas city council were elected by an exclusively at-large system of voting. Eight places on the ballot were reserved for candidates who resided in one of the city's eight residential districts. Three seats, including the mayor's, were open to candidates regardless of residence. Voting for all 11 seats was citywide. For many years council elections have been nonpartisan, involving slating groups rather than political parties. Electoral success has depended in major part upon support of one such group, the Citizens' Charter Association.

Plaintiffs representing Negro citizens of Dallas challenged this election system in 1971. Certain Mexican-Americans intervened, but were dismissed from the case for failure to respond to interrogatories. In 1975, the District Court concluded that the at-large election system unconstitutionally diluted the vote of Dallas' Negro citizens. The court rested this conclusion on

findings dealing with the geographic concentration of Negroes within the city, the effect of slating groups, and the city's history of *de jure* discrimination.

Instead of formulating its own districting plan, the court afforded the city council an opportunity to enact a valid plan. The council duly adopted an ordinance that provides for election of a council member from each of eight single-member districts,the remaining three to be elected from the city at large. After careful examination of this plan, the District Court approved it. The court observed that single-member districts generally are preferable, but concluded that several facts weighed in favor of the city's new system. First, the court noted that any plan which did not consider the effect on Mexican-American voters might itself be constitutionally suspect. Indeed, detailed consideration of the plan's effect upon those voters, who were more geographically dispersed than Negro citizens, convinced the District Court that their electoral power would be enhanced. Second, the new plan permitted some citywide representation in a body that functioned as a legislature for the entire city. At-large voting in Dallas dated back to 1907, and there was no showing that its use in the new plan would have adverse effects on any minority. The court found a recent marked improvement in the political participation and general posture of minority groups in Dallas.[1]

On appeal, the Court of Appeals reversed. Relying primarily on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), and apparently drawing no distinction in this respect between court-ordered and legislatively enacted redistricting, the court held that absent unusual circumstances single-member districts are to be preferred. It concluded that no such circumstance existed. The case thereupon was remanded with instructions that the city redistrict itself into an appropriate

[1] As noted in the opinion of the District Court, the racial composition of the Dallas city council in 1975 was two Negroes, one Mexican-American, and eight whites. 399 F.Supp. 782, 787 n. 5 (N.D. Tex. 1975).

number of single-member districts. A rehearing was denied, and a requested stay of mandate was refused.

II.

Applicants level three charges of error at the judgment below. First, they contend that the Court of Appeals improperly ignored the distinctions drawn by this Court between state-enacted and court-ordered reapportionment plans. Applicants further argue that the court erroneously held that the city, in fashioning a remedy to correct unconstitutional dilution of the voting rights of one minority group, cannot consider the remedy's impact on other groups in the absence of an adjudication that the other group's rights also were impaired unconstitutionally. Applicants' final claim is that the court below erred in failing to consider the city's need for some citywide representation.

This Court has declared repeatedly that the standards for evaluating the use of multimember and at-large voting plans differ depending on whether a federal court or a state legislative body initiated the use. *E.g., Chapman v. Meier,* 420 U.S. 1, 18 (1975); see *Connor v. Finch.* ____U.S.____, 97 S.Ct. 1828, 1833 (1977). When a federal court imposes a reapportionment plan upon a State, single-member districts are preferable in the absence of unusual circumstances. *East Carroll Parish School Bd., supra,* at 639. But "legislative reapportionment is primarily a matter for legislative consideration and determination," *Reynolds v. Sims,* 377 U.S. 533, 586 (1964). When the State accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the Equal Protection Clause. *Burns v. Richardson,* 384 U.S. 73, 85 (1966); cf. *Connor v. Finch,* ____U.S., at ____, 97 S.Ct., at 1833. The Court of Appeals, by holding the Dallas city council to the "unusual circumstances" test of *East Carroll Parish School Bd.,* appears to have confused these two standards.[2]

[2] The distinction is between a court-*ordered* plan, which may or may not have been proposed by a legislative body, and a court-*approved* plan, which has been initiated and promulgated as law by the legislative body. *East Carroll Parish School Bd.* involved the former, and this Court noted that "in submitting the plan to the District Court, the [police] jury did not purport to reapportion itself in accordance with the 1968 enabling legislation . . . ." 424 U.S., at 639 n. 6. Here, by contrast, "[t]he district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional." 551 F.2d 1043, 1045 (CA5 1977). Thus, a rule of limited deference to local legislative judgments is appropriate in this case, for as we held in *Burns v. Richardson,* 384 U.S., at 85, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

While we have never explicitly held that municipal election plans are entitled to the same respect accorded those of state legislatures, there is reason to believe that they should be. We indicated as much in *Chapman v. Meier, supra,* at 27:

> "[R]eapportionment is primarily the duty and responsibility of the state through its legislature or other body rather than of a federal court."

(Citing *Reynolds v. Sims,* 377 U.S. 533 (1964).) See also *Dusch v. Davis,* 387 U.S. 112, 116-117 (1967).

The two additional errors advanced by applicants also may have merit. The view of the court below that a plan's effect on various minority groups can be considered only after an adjudication of unconstitutional impairment as to those groups may be incompatible with the rationale of our recent decision in *United Jewish Orgs. v. Carey,* ____U.S.____, 97 S.Ct. 996 (1977). See also *Gaffney v. Cummings,* 412 U.S. 735, 752-754 (1973).[3] Moreover, no apparent weight was given the express findings of the District Court with respect to the legitimate interest of the city in "having some at-large representation on [its] City Council." 399 F.Supp., at 795.[4] I had thought it clear that a federal court

[3] The opposition to the new plan of certain Mexican-American voters does not render the District Court's findings in this respect automatically invalid. Those intervenors were never certified as the representatives of any class.

[4] After alluding to the evidence and to the concession by the plaintiffs (who had themselves proposed a plan involving the citywide election of the member of the council designated as mayor), the District Court found:

> "The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the

reviewing a reapportionment plan should consider and give appropriate weight to any valid state or municipal interest found to be furthered by the plan under consideration. See, *e.g., Reynolds v. Sims, supra,* at 578-581. Citywide representation appears to be such an interest. Cf. *Dusch, supra; Fortson v. Dorsey,* 379 U.S. 433, 438 (1965).

III.

The general principles that guide a Circuit Justice with respect to stay applications are well settled. The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment. Moreover, the party seeking a stay bears the burden of advancing pursuasive reasons why failure to grant could lead to irreparable harm. In light of the foregoing considerations, the Circuit Justice must make a judgment whether there is a "reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Graves v. Barnes,* 405 U.S. 1201, 1203 (1972).

I think there is a reasonable probability that at least four Members of the Court will grant certiorari in this case. The case involves a major city that has adhered to its tradition of at-large elections since 1907.[5] As indicated above, the Court of Appeals may well have thought that the principles applicable to a state legislative redistricting did not apply with full force to such action by a city council. It also appears likely that established principles of general application in the redistricting cases were not applied correctly. Applicants also claim irreparable injury unless a stay is

Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole, e.g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm." 399 F.Supp., at 795 (footnote omitted).

[5] The District Court found:

". . . that at-large voting, especially on the municipal level has been an integral part of Texas local governments [since 1907 in Dallas] and that at-large voting schemes have their genesis in reasons other than those racially motivated." 399 F.Supp., at 797.

granted. Although the next regular election is not scheduled until April 1979, if the judgment of the Court of Appeals is not stayed, experience indicates that respondents will press promptly for a special election. In their response to this application, they comment that a stay "would unjustifiably prolong" an appropriate remedy. If the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted. In any event, in a situation of this kind the capacity of the incumbent council to function effectively in the public interest may be impaired if the judgment is not stayed.

I will, therefore, enter an order recalling the mandate and staying the judgment of the Court of Appeals pending disposition of the petition for certiorari.

Supreme Court, U. S.
FILED
FEB 24 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

OCTOBER TERM, 1977

77-529

WES WISE, Mayor of the City of Dallas, Et Al.,
Petitioners,

vs.

ALBERT L. LIPSCOMB, Et Al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 7, 1977
CERTIORARI GRANTED JANUARY 9, 1978

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RELEVANT DOCKET ENTRIES

March 10, 1971:	Filed Complaint.
March 19, 1971:	Filed Defendants' motion to dismiss.
March 27, 1971:	Filed memorandum decision that all relief prayed for by Plaintiffs should be denied, this action is hereby dismissed at Plaintiffs' cost.
March 29, 1971:	Filed Plaintiffs' notice of appeal from order of this Court entered March 27, 1971, denying all relief requested and dismissing Plaintiffs' suit.
May 22, 1972:	Filed certified copy of judgment issued as mandate from Court of Appeals: "It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be, and same is hereby vacated; and this cause be, and the same is hereby remanded to the District Court for proceedings not inconsistent with the opinion of this Court; it is further ordered that Defendants-Appellees)Hon. Erik Jonsson, et al) pay to Plaintiffs-Appellants the costs on appeal to be taxed by the Court of Appeals."
June 19, 1972:	Filed Defendants' Wes Wise, Ted Holland, Doug Fain, Anita Martinez, Sheffield Kadane, Jerry Gilmore, Fred Zeder, Gary Weber, Lawrence Ackels, Russell Smith and George Allen answer to the amended bill of complaint.
September 14, 1972:	Filed Plaintiffs' first amended complaint, and adding additional party Plaintiffs.
January 15, 1974:	Filed second amended complaint, including Rule 23 allegation.

February 15, 1974:	Filed Defendants' motion to dismiss named party Plaintiffs.
February 20, 1974:	Filed Defendants' first amended original answer.
July 16, 1974:	Filed application for intervention as Plaintiff of Adelfa B. Callejo, Trini Garza, Gilbert A. Hernandez, Onesimo Hernandez, Rene Martinez, Sam Moreno, and Florentino Ramirez.
December 9, 1974:	Filed Order: "Application for intervention filed July 16, 1974 is denied with the specific right granted to the intervenors, in the event the present at-large system is held to be unconstitutional, to participate in the manner directed by this Court, in any hearing or discussions before this Court concerning the remedy to be adjudged; it is further ordered that this action will proceed as a class action representative of a class of all black citizens within the City of Dallas; Plaintiffs are adequate to represent members of the class; that Plaintiff Lipscomb is a member of the class defined herein; and that any attempt to represent himself as an individual would result in the same delay and difficulty as set out hereinabove and it is the specific finding of this Court that the questions of law and fact presented herein are common to all members of the class and predominate over any question affecting only individual interests of members, and that a class action is superior to other available methods in the fair and efficient adjudication of this controversy."

January 24, 1975:	Filed certified copy of Dallas City Council resolution dated January 20, 1975 with letter from N. Alex Bickley, City Attorney, to Judge Mahon. Map attached.
March 25, 1975:	Filed memorandum opinion.
April 3, 1975:	Filed Intervenors' motion for further relief.
April 11, 1975:	Filed Plaintiffs' motion to alter or amend the judgment of the Court.
April 11, 1975:	Filed Plaintiffs' notice of appeal.
April 16, 1975:	Filed Intervenors' notice of appeal to the Fifth Circuit from the order of March 25, 1975.
May 22, 1975:	Filed judgment that the relief set forth in the Court's memorandum opinion of March 25, 1975 be in all respects granted.
June 10, 1975:	Filed Plaintiffs' notice of appeal to the Fifth Circuit, from the judgment entered on May 22, 1975.
June 20, 1975:	Filed notice of appeal by Intervenors from the judgment entered on May 22, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
CIVIL ACTION NO. CA-3-4571-A

Albert L. Lipscomb, Lovie M. Lipscomb, Judith Lott, Elsie Faye Heggins, J. B. Jackson, Alvin Stoneham, Jr., Johnny Hughes Everett, Carl Williams, Shirley Harvey, Geraldine Walker, Joyce Williams, Bill Stoner, E. A. Shively, Dr. Eugene Dorsey, Pancho Medrano, Louis Estrada, Mary Salazar, Thelma Washington and Francis Harris, individually and on behalf of all others similarly situated,

Plaintiffs

vs.

The Honorable WES WISE, Mayor of the City of Dallas, Mr. GEORGE ALLEN, Mayor Pro Tem of the City of Dallas; RUSSELL B. SMITH, member of the City Council of the City of Dallas; JERRY C. GILMORE, member of the City Council of the City of Dallas; GARY WEBER, member of the City Council of the City of Dallas; LUCY PATTERSON, member of the City Council of the City of Dallas; CHARLES H. STOREY, member of the City Council of the City of Dallas; PEDRO AGUIRRE, member of the City Council of the City of Dallas; CHARLES TERRELL, member of the City Council of the City of Dallas; ADLENE HARRISON; member of the City Council of the City of Dallas; and their successors in office,

Defendants

SECOND AMENDED COMPLAINT

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to Title 42

United States Code, Sections 1971, 1981, 1983 and 1988 and Title 28 United States Code, Sections 1331, 1343, 220[illegible] and 2202 this being an action in which citizens of the United States contend they have been, are now, and threaten to continue to be denied rights, privileges and immunities secured by the Constitution of the United States under the Equal Protection Clau[illegible]e of the Fourteenth Amendment, the right to vote under the Fifteenth Amendment, and thereby are denied their civil rights as citizens of the United States. This is further an action pursuant to Rule 23, Fed. Rules Civ. Proc.

2. This is a proceeding for permanent injunction enjoining Defendants, and each of them their agents, employees and successors from carrying out elections for municipal office in the City of Dallas, specifically, elections for the City Council of Dallas, in a manner which constitutes a dillution of racial minority voting strength, and as such, a denial of the right to vote, in contravention of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

3. This is further a proceeding for a declaratory judgment, pursuant to Title 28, Sections 2201 and 2202, to determine and define the legal rights and relations of Plaintiffs in the subject matter of this controversy and for a final adjudication of all matters in actual controversy between the parties to this cause.

PLAINTIFFS

4. Plaintiffs are Albert L. Lipscomb, Lovie M. Lipscomb, Judith Lott, Elsie Faye Heggins, J. B. Jackson, Alvin Stoneham, Jr., Johnny Hughes Everett, Carl Williams, Shirley Harvey, Geraldine Walker, Joyce Williams, Bill Stoner, E. A. Shively, Dr. Eugene Dorsey, Pancho Medrano, Francis Harris, Louis Estrada, Mary Salazar, and Thelma Washington. All individual Plaintiffs are citizens of the United States and the State of Texas, residing in the City of Dallas, Texas. Individual Plaintiffs all

reside in the geographical area known hereinafter as the "racial minority community".

5. Plaintiffs also sue as representative parties on behalf of a class of black and brown citizens who reside in the racial minority community. Such representation is proper because the class is so numerous that joinder of all members is impracticable; virtually all questions of law and fact are common to the class; the claims of Plaintiffs are typical of and identical to the claims of the class; and the Plaintiffs fairly and adequately protect the interests of the class. Moreover, Defendants herein have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

DEFENDANTS

6. Defendants are Wes Wise, Mayor of the City of Dallas, George Allen, Mayor Pro Tem of the City of Dallas, Russell B. Smith, Deputy Mayor Pro Tem of the City of Dallas, Adlene Harrison, member of the City Council of the City of Dallas, Mrs. Lucy Patterson, member of the City Council of the City of Dallas, Pedro Aguirre, member of the City Council of the City of Dallas, L. A. Murr, member of the City Council of the City of Dallas, Jerry Gilmore, member of the City Council of the City of Dallas, Charles Storey, member of the City Council of the City of Dallas, Charles Terrell, member of the City Council of the City of Dallas, and Gary Weber, member of the City Council of the City of Dallas.

7. The Defendants have solely within their control the power to revise the boundaries of any or all of the eight electorial districts to maintain a substantial equality of population, and *the power to alter the present election scheme to conform to established principles of law.*

CAUSE OF ACTION

8. Acting under color of the autority conferred upon them by the laws of the State of Texas and the Charter of the City of Dallas, tne Defendants have adopted and are presently pursuing a plan, policy and practice in which all qualified voters of the City of Dallas are entitled to vote for one candidate for City Council in each of eleven places on the ballot. The Charter requires that the City be divided into eight (8) districts known as Districts 1, 2, 3, 4, 5, 6, 7 and 8 and that no person is eligible as a candidate for any one place unless he is at the time a bona fide resident of such district; i.e., 1, 2, 3, 4, 5, 6, 7 and 8 respectively. [Charter of the City of Dallas, Chapter IV. Section 5 and Section 6] The Charter further requires that a candidate for Place Numbers 9, 10 or 11 may be a resident of any portion of the City.

9. There exists in the City of Dallas a community known as the "racial minority community" or "the community" which is essentially an unbroken bank from the western edge of the City of Dallas through the central business district including the Fair Park area, and South Dallas, then due south to the City limits. This community is predominately inhabited by members of the black (African-American) and brown (Mexican-American) racial minorites. This community, besides being racially definable, has certain social, economic and political interests which differ from those of the white (Anglo-American) majority.

10. Long years of systematic oppression, discrimination, enforced poverty, and political neglect have deprived the residents of the racial minority community of the rightful rewards of citizenship in the City of Dallas. The residents of this community seek to cause the City Council of the City of Dallas to become more responsive to specific areas of grievance and dissatisfaction with the policies and practices controlled by the City Council of the City of Dallas.

11. Under the current system of selection of Members of the City Council, the racial minority community has virtually no political force, influence or control over Members of the City Council, because the effect of their vote is cancelled out by other well-established and hostile interest groups in other areas of the City of Dallas inhabited by the white (Anglo-American) majority.

12. Under the current system of electing members of the City Council of Dallas, Texas through at-large elections, residents of racial minority community areas which are racially identifiable and economically identifiable have little or no opportunity to participate in the political process of nomination or election of candidates other than such minimal opportunity as is accorded the poor black or brown citizen through the benevolence of the dominant white citizenry of the City of Dallas, Texas. These denials, based as they are on race, and/or concomitant social, economic and political factors, result in a denial of the right to effective sufferage to black and brown citizens and are thus denials of the equal protection of the law and of the due process of law as guaranteed to Plaintiffs as secured to them by the Fourteenth Amendment to the Constitution of the United States.

13. The requirement that all candidates for election to the City Council of Dallas, Texas run at-large places an insurmountable and unconscionable burden on economically insecure black or brown candidates who are forced to compete against an exceptionally well financed political machine, or power structure, with the ultimate result that only those black or brown candidates who are able to secure the blessings of the dominate white citizens group are accorded meaningful participation in the electoral process. Absent such blessing, any political campaign launched by a black or brown candidate under the at-large system is fordoomed. This results in a denial to the right of meaningful participation in the right to sufferage and is thus a denial to Plaintiffs of the equal protection of the law of due process of law

as is secured to them by the Fourteenth Amendment to the Constitution of the United States.

14. Permitting all residents of the City of Dallas to vote on the candidates within which the racial minority community is located has the invidious effect of dilluting the vote of the residents living in that community, therefore denying complainants equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution.

15. Plaintiffs, and members of the class they represent, have continually and persistently petitioned Defendants to voluntarily discontinue the discriminatory practice of diluting racial minority voting strength by means of the at-large election scheme. However, defendants have wholly failed and refused to comply with Plaintiffs' request. Moreover, defendants have persisted in litigating this cause on the merits in spite of the legal precedent pointing to the futility of such litigation. Such continued litigation of the merits of the claim constitutes unreasonable, obdurate obstinancy, which defeats the congessional policy, embodied in the statures set forth in the first paragraph of this complaint. Therefore, plaintiffs seek herein an award of reasonable attorney's fees, and all costs.

WHEREFORE, Plaintiffs respectfully pray:

A. That a hearing be had and evidence heard to determine whether the electoral scheme now in question has the invidious effect of causing the votes cast in the racial minority community to have a force and effect in elections to municipal office of the City of Dallas inferior to the force and effect of the votes cast generally by the inhabitants of the City of Dallas, as to constitute dilution of racial minority voting and as such, be a denial of equal protection of the law and a denial of the right to vote in contravention of the Fourteenth and Fifteenth Amendments to the Constitution of the United States.

B. That at the conclusion of said hearing a permanent injunction be granted against all defendants requiring them to refrain from conducting any elections for City Council of Dallas, Texas until such time as the present at-large voting scheme is discarded and the City of Dallas is redistricted into individual member voting districts, drawn so as not to have any foreseeable effect of dillution of racial minority voting strength.

C. That the Court retain jurisdiction over this matter and issue a final order approving any apportionment plan for the City of Dallas before the 1975 elections are held.

D. That Plaintiffs be awarded a reasonable attorney's fee, as well as all costs incurred in this litigation.

E. That the Court issue any further relief that it deems just and reasonable.

Respectfully submitted,

Dallas Legal Services Found., Inc.
912 Commerce St., Room 202
Dallas, Texas 75202
742-1631

By:.....
Sylvia M. Demarest

Edward B. Cloutman III
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Second Amended Complaint, Plaintiffs Motion to File Second Amended Complaint and Substitute Party Defendants and Order has been hand delivered to Mr. Alex Bickley, attorney for Defendants on this the 8th day of January, 1974.

/s/ Sylvia M. Demarest

Sylvia M. Demarest

Dallas Legal Services Found., Inc.
912 Commerce St., Room 202
Dallas, Texas 75202
742-1631

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
CIVIL ACTION NO. CA-3-4571-E

Albert L. Lipscomb, et al.

vs.

The Honorable Wes Wise, Mayor
of the City of Dallas, et al.

FIRST AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

The Defendants make the following Answer to Plaintiffs' Second Amended Complaint:

I.

Defendants deny the allegation of Paragraph 1 of Plaintiffs' Second Amended Complaint wherein Plaintiffs allege that this Court has jurisdiction of the subject matter of this action and further deny the allegations of that paragraph that Defendants have denied Plaintiffs any rights, privileges or immunities secured by the Constitution or laws of the United States or that Defendants are now denying or threaten to deny to Plaintiffs any rights, privileges or immunities secured by the Constitution or laws of the United States. Defendants deny the allegations of Paragraph 1 of Plaintiffs' Second Amended Complaint that this is a proper class action under Rule 23 F.R.Civ.P.

II.

Defendants admit the allegation of Paragraph 2 of Plaintiffs' Second Amended Complaint that this is a proceeding for permanent injunction, but Defendants deny that Plaintiffs have stated a claim upon which any injunctive relief can be granted and deny that the Defendants or any system of elections of the

City of Dallas have caused a dilution of racial minority voting strength or any denial of the right to vote in contravention of the Fourteenth or Fifteenth Amendments to the Constitution of the United States.

III.

Defendants admit the allegations of Paragraph 3 of Plaintiffs' Second Amended Complaint that this is a proceeding for a declaratory judgment pursuant to Title 28, Secs. 2201 and 2202, but deny that Plaintiffs have stated any claim upon which such declaratory relief can be granted.

IV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegation of Paragraph 4 of Plaintiffs' Second Amended Complaint that all individual Plaintiffs are citizens of the United States and of the State of Texas, residing in the City of Dallas, Texas, or that individual Plaintiffs all reside in the geographic area described by Plaintiffs as the "racial minority community."

V.

Defendants deny the allegations of Paragraph 5 of Plaintiffs' Second Amended Complaint that the class representation sought by Plaintiffs is proper and deny that the class is so numerous that joinder of all members is impracticable, deny that virtually all questions of law and fact are common to the class, deny that the claims of Plaintiffs are typical of and identical to the claims of the class, deny that Plaintiffs fairly and adequately protect the interests of the class, deny that Defendants have acted or refused to act on grounds generally applicable to the class and deny that the injunctive or declaratory relief sought by Plaintiffs is appropriate to the alleged class as a whole.

VI.

Defendants admit the allegations of Paragraph 6 of Plaintiffs' Second Amended Complaint.

VII.

Defendants admit the allegation of Paragraph 7 of Plaintiffs' Second Amended Complaint that Defendants have solely within their control the power to revise the boundaries of any or all of the eight electoral districts to maintain a substantial equality of population. Defendants deny the allegation of Paragraph 7 of Plaintiffs' Second Amended Complaint that Defendants have solely within their control the power to alter the manner in which the City Council is elected.

VIII.

Defendants admit the allegations of Paragraph 8 of Plaintiffs' Second Amended Complaint.

IX.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 9 of Plaintiffs' Second Amended Complaint.

X.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 10 of Plaintiffs' Second Amended Complaint, deny that Plaintiffs are being deprived of the rightful rewards of citizenship in the City of Dallas and say that the City Council of the City of Dallas is properly responsive to the needs of all citizens and areas of the City of Dallas.

XI.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 11 of Plaintiffs' Second Amended Complaint and deny that any person is deprived of full participation in the political system of the City of Dallas by virtue of any act of any of the Defendants or by virtue of present system of elections.

XII.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 12 of Plaintiffs' Second Amended Complaint and deny that the present system of at-large elections deprives any citizen of the opportunity to participate in the process of nomination or election of candidates to the City Council of the City of Dallas or that it denies effective suffrage to any citizen.

XIII.

Defendants deny the allegation of Paragraph 13 of Plaintiffs' Second Amended Complaint that the present at-large system of elections places any insurmountable or unconscionable burden upon any citizen or that such system results in any denial of the rights of meaningful participation in the political process.

XIV.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 14 of Plaintiffs' Second Amended Complaint.

XV.

Defendants deny the allegations of Paragraph 15 of Plaintiffs' Second Amended Complaint.

Respectfully submitted,

N. Alex Bickley, City Attorney
T. Alex Eastus, Ass't City Attorney
Joseph G. Werner, Ass't City Attorney
Lois Bacon, Ass't City Attorney
501 Municipal Building
Dallas, Texas 75201
748-9711, Ext. 294

By Lois Bacon

CERTIFICATE OF SERVICE

A copy of the foregoing First Amended Original Answer was served on Sylvia A. Demarest, Dallas Legal Services, Inc., Edward B. Cloutman, III, Mullinax, Wells, Mauzy and Babb, James A. Johnston, Johnston and Dixon, and Walter L. Irvin, Hudson and Irvin, Attorneys for Plaintiffs, by placing it in a depository of the United States Mail with sufficient postage attached thereto on this the 15 day of February, 1974.

Lois Bacon

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4571-E

Albert L. Lipscomb et al.

vs.

Erik Jonsson et al.

APPLICATION FOR INTERVENTION

TO THE HONORABLE JUDGE OF SAID COURT:

Adelpha B. Callejo, Trini Garza, Gilbert A. Hernandez, Onesimo Hernandez, Rene Martinez, Sam Moreno, and Florentino Ramirez, pursuant to Rule 24(a)(2) and Rule 24(b)(2) of the Federal Rules of Civil Procedure, moves for leave to intervene as a Plaintiff and become a party to this action for the purposes and with all the rights provided by said Rule 24(a)(2) and Rule 24(b)(2), in order to assert the claim set forth in their proposed complaint of which a copy is hereto attached, on the grounds that:

I.

Applicants are so situated that the disposition of the main action may as a practical matter impair or impede their ability to protect that interest they have in the final disposition of this matter.

II.

Applicants' interests are not adequately represented by the existing parties.

III.

This is a class action brought by Applicants pursuant to Rule

23(a)(3) of the Federal Rule of Civil Procedure, on their behalf and on behalf of other Mexican-Americans seeking to declare unconstitutional the at large election system presently utilized by Defendant, City of Dallas.

IV.

Applicants are charged with a public duty to intervene and have more than a mere general interest in the outcome of this litigation, in that, the final disposition of this litigation will affect Applicants, in the class they represent, at the electoral process which is used to select public officials to serve as councilmen with Defendant, City of Dallas.

V.

Applicants have a claim against Defendant similar to or identical with that asserted by Plaintiff in this matter.

VI.

Applicants' claim and the main action have common questions of law and fact.

VII.

The participation of Applicants as a party to this action will materially aid in the expedition and determination of this action and will not delay or prejudice the adjudication of the rights of the original parties. Applicants should be allowed to intervene as a member of the heretoforementioned former class represented by other Mexican-Americans who did not adequately represent the interest of Applicants and the class they represent.

WHEREFORE, PREMISES CONSIDERED, Applicants pray that the Court immediately hear this Application for Intervention, and that after consideration of the facts and the law on

said matter, enter an Order allowing Applicants to intervene.

Respectfully submitted,
Hernandez, Inc.

Frank P. Hernandez
UCC Tower, 2nd Floor
Dallas, Texas 75247
630-3683

Callejo and Callejo

William F. Callejo
902 Fidelity Union Life Building
Dallas, Texas 75201
741-6711

CERTIFICATE OF SERVICE

This is to certify on the ____ day of July, 1974, a true copy of the foregoing Application for Intervention was served upon counsel for the parties noted below by delivering to them personally a copy of said Application for Intervention.

Ms. Sylvia Demarest
Dallas Legal Services Project
Attorney for Plaintiff

Edward B. Cloutman
Mullinax, Wells, Mauzy & Babb
Attorney for Plaintiff

Alex Bickley Esq.
City of Dallas
Attorney for Defendant

Frank P. Hernandez

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4571-E

Albert L. Lipscomb et al.
vs.
Erik Jonsson et al.

INTERVENOR'S COMPLAINT

I.

The Plaintiffs adopt and incorporate the allegation in Paragraph I. of Plaintiffs Original and Amended Complaints.

II.

These Plaintiffs bring this action on their own behalf, and on behalf of other Mexican-Americans seeking equal representation in the election process of the City of Dallas councilmen. These are common questions of law and fact affecting the rights of Mexican-Americans in the aforestated group and class who are and have been discriminated against in ways which deprive and tend to deprive them of equal opportunity to represent and be representatives as councilmen of the City of Dallas, and whose rights are otherwise affected in their opportunity to become elected representatives of the citizens of the City of Dallas. These persons are so numerous as to make it impractical to bring them all before this Court. However, a common relief is sought and these Plaintiffs are an adequate representative of the said class.

III.

This is a proceeding for a preliminary and permanent injunction and to have ordinances of the City of Dallas declared unconstitutional.

IV.

Plaintiffs are Mexican-American citizens of the United States, the State of Texas, and the City of Dallas.

V.

Defendant, City of Dallas, is a non-profit governmental agency with its main place of business located in the City of Dallas, County of Dallas, Texas, Main and Harwood, Dallas, Texas.

VI.

All matters regarding the election of City Councilmen of Defendant, the conditions of the election, and the methods by which individuals are elected, have been and at all times material to this action, are governed and controlled by the City Charter of the City of Dallas, exclusively, and by the Defendant, City of Dallas, and its elected representatives, the Mayor and the City Councilmen representing the citizens of said City.

VII.

Plaintiffs and the class they represent are fully qualified to represent the said class and are qualified voters of the City of Dallas.

VIII.

Plaintiffs and the class they represent have no plain, adequate, or complete remedy at law to redress the wrongs alleged herein and this suit is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the Defendant's policies, practices, customs and usages unless said laws and activities are declared unconstitutional and violative of the law.

IX.

Plaintiff would show the Court that they have been discriminated against because of their national origin and have been deprived participation in the electoral process of selecting and electing representatives of Defendant to serve as councilmen and that such denial has been caused by the actions of the Defendant and its supportive groups. Plaintiff would further

show that they have been denied their constitutional rights to elect and select representatives to serve as City Councilmen because of the unconstitutional at large election system utilized by Defendant for selecting City Councilmen, and that this discrimination is expressed in the form of the at large election system which is presently used by said Defendant to elect its representatives. Plaintiff would show that as a class Mexican-Americans are denied respective participation in said process because of their national origin and further because they do not have the necessary economic ability to participate in at large elections effectively in order to be able to select their representatives.

X.

Plaintiff would show the Court that they are an identifiable minority group which exists within the boundaries of the Defendant City of Dallas, that they have been recognized as said identifiable minority group, and that as a class they have been discriminated against because of their national origin and their inability to participate effectively in the electoral process.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practical date, order this case to be in every way expedited and upon such hearing to:

Grant Plaintiffs and the class they represent a preliminary and permanent injunction enjoining the Defendant, City of Dallas, its agents, successors, employees, attorneys and those acting in concert with them and at their discretion from continuing with policies, practices, customs, usages of denying, abridging, withholding, conditioning, limiting or otherwise interfering with the rights of Plaintiffs and others similarly situated to enjoy equal opportunity to participate in the electoral process in the election of representatives and the councilmen of the Defendant, and;

further, that this Court declare those provisions of the City Charter of the City of Dallas which provide for election of City Councilmen on an at large basis unconstitutional; and

further, that this Court order that a new form of electing representatives to the City of Dallas as City Councilmen be implemented by said Defendant so that the rights, privileges, and guarantees of Mexican-Americans will be protected and so that they will have an effective electoral voice in the selection and election of representatives as City Councilmen to the City of Dallas.

Allow for Plaintiff-Intervenor for costs herein, and such other additional relief as may appear to this Court to be equitable and just.

Respectfully submitted,

Hernandez, Inc.

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Callejo and Callejo

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902 Fidelity Union Life Bldg.
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CERTIFICATE OF SERVICE

Ms. Sylvia Demarest
Dallas Legal Services Project
Attorney for Plaintiff

Edward B. Cloutman
Mullinax, Wells, Mauzy & Babb
Attorney for Plaintiff

Alex Bickley Esq.
City of Dallas
Attorney for Defendant

Frank P. Hernandez

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA 3-4571-E

Albert L. Lipscomb, Et Al.

vs.

Mayor Wes Wise, Et Al.

ORDER

On this 9th day of December, 1974, came on to be resumed the hearing of the above-entitled and numbered cause, but prior to any further action in the case certain motions pending were considered by the Court, to wit:

1. Application for Intervention filed by Mr. Frank P. Hernandez and Mr. William F. Callejo on July 16, 1974, and

2. The Motion to Sever Individual Plaintiff as Class Representative and Motion to Withdraw as Counsel as filed on July 31, 1974, by named counsel for plaintiffs.

It appeared that on the initial filing of this lawsuit on the 10th day of March, 1971, there were included as plaintiffs members of the Mexican-American Class and the action was on behalf of all the minority groups including the Blacks and Mexican-Americans who live within the City of Dallas. The defendants sought to elicit written interrogatories from all of the plaintiffs. Certain of the plaintiffs refused to respond to the interrogatories and upon contact by their counsel continued to refuse to respond. Included in this group were all of the Mexican-American Race originally included as plaintiff in the lawsuit.

Upon motion duly made and hearing had the Court dismissed from the lawsuit all of those members of the plaintiff's class who

refused to respond to written interrogatories. Included within this group were all of those of Mexican-American descent.

Prior to the entry of this Order the plaintiffs had amended their pleadings by their Second Amended Original Complaint and included in the Amended Complaint were both the Black and Brown citizens of Dallas. However, counsel determined that after all of the Mexican-American plaintiffs were dismissed and having no individual Mexican-American plaintiff that they could no longer represent the Mexican-Americans as a class and therefore urged the Court to consider this a class action with the class being those Black citizens residing within the City limits of the City of Dallas.

After a portion of the case had been presented to the Court and the trial had been commenced and recessed, the intervenors filed their motion on July 16, 1974, for the purpose of intervening on behalf of the Mexican-American citizens in the City of Dallas. The testimony previously presented to this Court shows that this class represents approximately 8% of the population of the City of Dallas, and the housing pattern is such that they are spread throughout the city limits of Dallas and are not a predominant factor in any concentrated census tract groups, and in view of these facts, the Court is of the opinion that to allow the intervention at this time would result in many difficulties in the management of this case as a class action and it would result in a delay that would possibly take the case beyond the time of the City Counsel election and the time that candidates need to file their candidacy. Moreover, the Court is of the opinion that to permit this intervention at this late hour would not assist the Court in resolving the issue of the constitutionality of the present at-large system. In view of these findings it is the Order of the Court that this intervention is denied with the specific right granted to the intervenors, in the event the present at-large

system is held to be unconstitutional, to participate in the manner directed by this Court, in any hearings or discussions before the Court concerning the remedy to be adjudged.

It is further ORDERED that this action will proceed as a class action representative of a class of all Black citizens within the City of Dallas, and that the Plaintiffs named herein are adequate to represent the interest of the members of the class. With regard to the issue of the status of the individual member of the class, Mr. Albert Lipscomb, it is the finding of this Court that he is a member of the class defined herein, and that any attempt to represent himself as an individual would result in the same delay and difficulty as set out hereinabove and it is the specific finding of this Court that the questions of law and fact presented herein are common to all members of the class and predominate over any question affecting only individual interests of members, and that a class action is superior to other available methods and the fair and efficient adjudication of this controversy.

Entered this 9th day of December, 1974.

/s/ Eldon B. Mahon
United States District Judge

TRANSCRIPT OF PROCEEDINGS

VOLUME IX

[4 l.1] THE COURT: Good morning. All right, the Court is ready to proceed with the second portion of the hearing concerning the Civil Action No. CA-3-4571 entitled Lipscomb and others versus Wes Wise, Et Al.

This phase of the hearing will relate primarily or entirely to the remedy that the court has heretofore declared that the present system of the at-large election of city council to be unconstitutional. The purpose of this hearing is now to —

The Court, of course, gave the city an opportunity — afforded the city an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional. The hearing will proceed at this time on the plan to determine the constitutionality of the new proposed plan by the City of Dallas.

* * *

[6 l.7] GEORGE ALLEN,

having been previously cautioned and sworn, testified further as follows, to-wit:

DIRECT EXAMINATION

BY MR. BICKLEY:

Q All right. You're Mr. George Allen, the Mayor Pro Tem of the City of Dallas, are you not?

A Yes, I am.

Q All right. And at the time that that was adopted by the city council, did the city council, to your certain [7] knowledge give any directions as to how the lines were to be drawn insofar as color or ethnic groups or anything else was concerned?

A No, sir.

Q Did they give any instructions that the districts were to be as nearly equal as possible?

A They did.

* * *

Q All right. Did the city council at that time look at the other plans and discuss them and talk about them and have open hearings and have people come before city council and talk [8] about them?

A We indeed did. And we did an awful lot of talking about our own plans without avail, of course, but yes, we did.

* * *

Q All right. Now, would you tell the Court from the viewpoint of yourself and of the group that you represent, and for the record, what is your race?

A Obviously black.

* * *

Q All right. And would you tell the Court why, in your opinion, if it is your opinion, that there should be three members elected at-large in addition to the single member districts?

* * *

[9 1.20] A I think that three at-large places are most important because, number 1, there is no way you can draw district lines in Dallas without seriously gerrymandering them, to be able to carve out whether it's three, nine, two, ten, one, eleven, zero, and again to a Mexican-American being elected. He has to have the benefit of at-large voting. There are many blacks, for [10] instance, that don't live in the predominatley — the two predominately black districts as currently drawn, that in the judgment of our community would make outstanding representatives on the Dallas city council. They live in small pockets like many Mexican-Americans do. They live in small pockets in far

North Dallas, in East Dallas, in the Love Field area and on — scattered all over the city.

I don't believe that these people should be summarily and automatically out of consideration by their community for a place on the council as their representative. They could very well be a candidate at large and stand a very good chance to win.

* * *

Q All right. Now, in the consideration insofar as zoning cases are concerned, do you see any benefit to the city as such in having people elected at-large or some elected at-large?

A Well, I don't know if it's a major benefit. I can see that obviously people elected from single member districts will give strong consideration in the best possible representation to their fellow councilmen to defend their particular [11] district in a zoning case.

I think the at-large people on the council will — should conceivably have a broader view of zoning and a broader interest in zoning. I think it would certainly work better than having eleven single member districts, for instance.

Q All right. If you had eleven single member districts, you would actually have some minorities, whether white, black, brown or red, in each district that would never get an opportunity to vote on and to elect a person of their choice, isn't that so?

A Oh, I believe that, but you have got some districts that there are no blacks or browns in.

Q Some in which there are just very few?

A Yes. Well, like far North Dallas, Northeast Dallas, I doubt whether you can scare up two black families in the whole district or maybe more than one Mexican-American family.

Q And unless they get to vote on somebody at-large, they really don't have a vote at all, do they?

A That is exactly what I was saying.

* * *

[13 l.16] But the planning is done pretty well city-wide, on a citywide basis.

* * *

[14] Q All right. And then, does it, to your mind — important or is it not important, is it or is it not important that there be somebody looking at the overall situation in order to help make those decisions?

A I think three at-large members is a desirable thing for balance, overall balance. This, I testified to before.

Q All right. And then, in spite of the fact that it is not the exact one which you wanted, did you say that so far as the City of Dallas is concerned, do you think this is the best plan for the City of Dallas?

A Oh, I think the eight-three plan is without a doub: the best plan.

* * *

Q Mr. Allen, I take it from your testimony and from your prior testimony in this matter and your deposition in particular that you are for single member districts?

A I certainly am. I testified as a witness for the plaintiffs and I made up my own mind in answering each question, sir.

* * *

[15] Q So that your opinion is that the City of Dallas needs single member districts?

A That is right.

* * *

[16 l.19] Q Okay. And so this plan, Defendant's 92, in fact, does utilize the same lines the City of Dallas has used prior to this

time for the residency requirement or place requirement in the at-large system?

A That is right.

Q Those districts haven't changed a bit, then, as far as you can tell?

A That's right.

* * *

[12] Q (By Mr. Cloutman) Do you understand, then, from the figures as they have been explained to you regarding this map and these numbers that there will be two predominately black districts provided by Defendant's 92 and 92-A?

A If these are the figures that relate to those lines, yes.

Q That is how they were offered, I assume.

A Yes, okay.

* * *

[19] Q And under your eight-three plan, if I recall, or at least under the eight-three plans you have discussed both at trial and at your deposition, your eight-three plan would have provided strong majority black districts in at least three council districts?

A Right.

Q And possibly a fourth in a coalition with Mexican-American voting?

A That is right.

Q And I believe you testified in your deposition that such a plan was a kind of eight-three you wanted to see city adopt?

A That is right.

Q All right. That would then be significantly, or it would be at least one place more than this one currently offers and possibly two?

A That is right.

* * *

[26 l.9] Q Councilman, under your proposed eight-three, there would be at least three safe minority seats and possibly four?

A Right.

Q Would that increase the chances for the kind of combinations that you seek?

A Surely.

Q That would be better, in your opinion?

A Surely.

Q Than the one presented to the Court here today?

A Oh, yes. That is why I tried to get it adopted.

Q Councilman, also for the record, I believe it has been established that you are one of the three black council persons on the city council presently, and I believe it also has been established that you have been backed in each of your elections by the Citizens' Charter Association?

A That is right.

Q Each one you have been successful.

[27] Do you see any difference, Councilman, in the affect, this eight-three proposed to the Court will have in terms of effectuating minority interests, implementing minority interests within the City of Dallas and the one that you propose that would elect three and possibly four minority candidates?

A Just that difference, that the present system permits us a guaranteed two black representatives, unless one chooses to run at-large and is elected. But my plan would guarantee a minimum of three black community and the Mexican-American community and the poor white community working together, which I don't have that hope, but it is possible.

* * *

CROSS-EXAMINATION

BY MR. HERNANDEZ:

Q Councilman, can we agree that the single member district is desirable, that it gives the people the opportunity to vote directly for their representative?

[28] A Yes, that is one of the reasons.

Q And can we also agree that the smaller the district is, that the better chance a particular minority group is of having their vote counted?

A If the minority population of that district is sufficiently substantial. A small district with a smaller black population, for instance, if the percentages will not change, wouldn't help us at all. But the percentage of blacks in a given district would be the determining factor, so far as I see it.

Q Or as to Mexican-Americans?

A Yes, right.

* * *

[29] Q Those two black representatives that would most likely be elected, would in your mind, would you think that they would represent or purport to represent the Mexican-American community?

A In the absence of a Mexican-American on the council, I think they would fill it incumbant upon them to represent the minorities. But if you're elected from practically all black districts, of course, you feel that your loyalty has to be to those people who elected you first.

* * *

Q So actually there are then two positions that would be available for the Mexican-American at-large?

A True.

Q And in order to get one of these positions, he would [30] have to be in the good graces of the Citizens' Charter Association, would he not?

A If — if future elections will go as the pattern that has been established in the past, I would say yes.

Q You have no reason to believe that they are going to change, have you?

A Well, I haven't thought much about it one way or the other.

Q Well, in effect, what the eight-three plan does —

A No. Any strong slating group, when you say CCA, I say any strong slating group, the Mexican-American would have to have the blessings of it to be able to win at-large.

Q Well, based on all the prior testimony in the case, the Mexican-American as a potential candidate is in no different position than the black American as a potential candidate in order to be a city councilman, is he?

A Right now?

Q Right now.

A You're right.

Q All right. So if the argument is made that in order for a black American to be on the council now, he must be in the good graces of the CCA or be tied with the slating group, then that argument holds true for the Mexican-American?

A I agree.

Q Under the eight-three plan, the black American, then, gets [31] some relief from that argument, does he not?

A He certainly does.

Q But the Mexican-American does not?

A That is right. But I don't know of a district plan that can be drawn that will give a majority of the population to the Mexican-American because you're doing what I wish we had done, live all over the city, we wouldn't have to worry about a lot of the ills right now that we are worrying about. Since we are not — then I just don't know of a plan, Frank, that we can draw, unless we do and you have — well, I don't know even if we gerrymander that we'll get a majority of Mexican-American districts.

Q Well, let me ask if the city — if the present city council attempted in any way to look at the seventeen, zero system or the twenty, zero.

THE COURT: Look at a what?

MR. BICKLEY: If it please the Court, we object to —

THE COURT: I didn't understand the question.

MR. BICKLEY: Seventeen, zero system.

THE COURT: He can ask him the question.

MR. BICKLEY: All right. Note our exception to far-afield Court drawing plans at this point.

MR. HERNANDEZ: Your Honor, Mr. Allen has testified in terms of his eight-three, in terms of the adopted eight-three.

[32] THE COURT: I understand. I just didn't understand what you said.

Q (By Mr. Hernandez) All right. In its consideration of coming up with this adopted eight-three plan, did the city consider a plan that these single member districts that guaranteed a Mexican-American a position on the council?

A No, Sir.

Q Gave it no consideration at all?

A Well, when I said no consideration, the one Mexican-American who is on the council has repeatedly said that there is no way they can draw a district that will guarantee them a representative of the council from single member districts.

Now, whether there is a way or not, I don't know. But, no, we didn't give consideration to it.

* * *

[33] Q (By Mr. Hernandez) I was merely asking if the city council considered whatever it would take in order to make a plan constitutionally viable as pertains to the Mexican-American community.

A It did not come up.

Q All right. Now, in effect, as you mentioned a moment ago, what the Mexican-American or the Chicano in Dallas has done is that he has assimilated into the population into the City of Dallas?

A Yes, sir.

Q And as a result, he is in effect going to lose representation on the council for doing that?

A Well, I don't know that he will or not. If we have three at-large slots, I don't know that he'll lose an opportunity to have a place on the council or not, Frank, I really don't.

Q Well, he's still tied to the CCA in order to get one of those at-large spots?

A Well, one of the at-large districts could have very well provided a Mexican-American a place on the council, if the proper working agreement with the black community could inure.

Q Well, as a practical, political matter, who do you contract with in order to get that guarantee for the Chicanos?

A Well, I think when you say "contract with," I think [34] it should be a natural for blacks and Mexican-Americans to work together because they are both in the same — well, no, you're not quite in the same position I'm in because we are at the bottom of the totem pole, but — well, that is the cost of assimilation, see? They kept us in our little Ghetto area and we couldn't break out, the laws kept us from breaking out. You were white, you could go anywhere, Frank. And the result is, now you can have your cake and eat it, too.

Q Well, the problem, isn't it, Councilman, is that we are white in terms of Chicano's being white for some purposes but we are not really white-white; isn't that the problem?

A Well, I don't know too much about the different shades of white. I mean, I know black and white and brown and red.

Q Well, you know that — and I think the Court is well aware — that if you put blacks and Chicano's together in a district, that is still a minority district.

A Right.

* * *

[351.11] Q Well, let's talk about that just for a second in light of the Citizens' Charter Association and the manner in which it has handled that at-large district.

Traditionally, Districts 9 and 10 have gone to different parts of the city, have they not, one to North Dallas and one to Oak Cliff?

MR. BICKLEY: May it please the Court, we object to going back into any other testimony back as — being the same testimony we took up in the lawsuit as to whether or not the present system is constitutional. This is what we are getting back into now. We object to it.

THE COURT: We don't want to go back into that. I'm interested in the constitutionality of this plan that is already proposed.

I wasn't quite sure, Mr. Hernandez, what your question was.

[36] MR. HERNANDEZ: My question, Your Honor, along that line, pertains only to Chicano's. And perhaps not being involved in the initial stage, I don't think that there has been very much testimony pertaining to the Chicano and the Citizens' Charter Association. I stand corrected if there has been.

THE COURT: All right. Well, now, what is your question?

MR. HERNANDEZ: The question is, that the Citizens' Charter Association has traditionally considered the two at-large spots 9 and 10 on a geographical basis, one for Oak Cliff and one for North Dallas. And when the Chicano's got Place 9, in effect, the Citizens' Charter Association took away Oak Cliff's seat in order to accommodate the Chicano, is that not correct?

THE WITNESS: I thought —

MR. BICKLEY: Just a moment, Mr. Allen.

Your Honor, do I understand, has the Court ruled on my objection to this question that goes to this question?

THE COURT: I'm going to overrule the objection on that.

MR. BICKLEY: Note our exception.

MR. HERNANDEZ: Thank you.

THE COURT: Of course, the thing that the Court's having problems with, the law doesn't guarantee to anybody, [37] the Court decisions say this, that you can, white or browns or blacks or reds, they are not guaranteed anything. They are just — the only thing the Court's looking at is that they are guaranteed equal access ability, the opportunity. That is what the law — that is what the Court's got to look at. And that is what we are looking at here from a constitutional standpoint. I mean, as to whether — you know, you're going to get into all kinds of things, Scandinavians or Jewish people or just anybody can say, well, I'm guaranteed one because we are different. But what the law says is that everybody is guaranteed access, accessability, the opportunity to get in, into the matter. So this is the problem that the Court is having with all this.

MR. HERNANDEZ: Your Honor, I am operating under the assumption that this Court has recognized that Mexican-American or Chicano's are an identifiable racial minority.

THE COURT: Yes. And the Courts have held this, that's right.

* * *

[39] Q You are familiar with the Citizens' Charter Association endorsement and selection process?

A I am familiar with the CCA endorsement of me and the ticket that they sponsored over the last three elections. But their procedures, no, I'm not. I've never been on a CCA board, either for endorsements or selection or anything else.

Q Do you know of any Mexican-American or Chicano who has ever run for city council that has won without Citizens' Charter Association endorsement?

A No, no.

Q Let me ask you a final question or two.

Dallas is the eighth largest city in America, I believe?

A Yes, sir.

Q And you know that Baltimore is the seventh largest city? Do you know that Baltimore has nine hundred and six [40] thousand residents and has nineteen council members?

A No. I really don't.

* * *

Q (By Mr. Hernandez) Let me ask you, Mr. Allen, is there any guarantee that the Citizens' Charter Association will in the future continue to look with a favorable light on Chicano's as it

has in the past three or four years?

A Frank, you know I can't answer that. Now, that would be pure speculation. I don't have any — I don't have the slightest reason to know what they are going to do in the future.

Q That is the main reason that you want single member districts that guaranteed black representation?

A Right.

Q Would it not be unreasonable for the Chicano's to want single member districts that would guarantee brown representation?

A Not at all.

[41] Q This plan doesn't do that, though, does it?

A I don't know of any plan that will. No, this plan probably would not.

* * *

[46 l.18] Q My question then to you is: Hadn't CCA support been required for the at-large success of minority candidates for city council?

A Certainly. I testified to that earlier.

Q And that would be true for Mexican-Americans as well as the black candidates who ran at-large?

A I'm sure of that. The evidence shows that.

Q Is there any reason to believe that without that [47] support that a new candidate to run — a new minority candidate could run for a city council office and succeed?

A Under at-large system?

Q Yes, sir.

A Oh, no, I don't believe he can.

* * *

[51 l.10] RECROSS-EXAMINATION

BY MR. HERNANDEZ:

Q Councilman, looking at the lines that generally white voters voting patterns in the past have tended to support white candidates and black voters, black candidates, is it a fair statement to say that is true for the brown community, brown voters generally support brown candidates?

A I would think so. I really don't know, but I would think so.

Q Now, this eight, three plan that was submitted and voted on, Councilman Pedro Aguirre, he voted against that eight, three plan, did he not?

A He did.

* * *

[531.21] MR. HERNANDEZ: I was merely trying to point out the problem that the Chicano community finds itself in under this plan.

THE COURT: Yes. I recognize this is one of the questions, as I said in conference with the attorneys this [54] morning, this is one of the serious questions confronting this Court in this stage of the proceeding, is the Chicano's interest. I mean, you're diluting either way probably with regard to the Chicano's. I mean, I can certainly see this.

MR. HERNANDEZ: I have no further questions.

* * *

[61 l.5] Q (By Mr. Hernandez) One was in terms that last week the members of the Chicano community did present themselves before the city council and attempted to discuss the eight-three plan or any other plan, did they not, do you recall that?

A Right.

Q I believe that Mayor Wise told them that they were in the

wrong forum, that they needed to be down here in the courthouse rather than at the city council?

A That's right. Because we had already submitted our plan.

Q In fact, when you submitted your plan, there was quite a bit of discussion over how quickly that was done.

A Well, the Judge put it on our minds that he wanted it quickly. I don't think that we — not too quickly for the Judge for his purpose.

Q I think the first vote was five in favor of the plan, two against the plan and four abstaining. And it wasn't until the city attorney instructed the council that you must vote that the plan then passed six to five.

A Well, Frank, I really don't remember that. All I remember is that we did get a majority vote on the eight, three, [62] and we went with it. Because that is the only vote that is significant, that is the only vote that goes into the record.

* * *

[64 l.21] Q (By Mr. Cloutman) Councilman, isn't it also true that prior to today, several persons who were named plaintiffs in this lawsuit, including Thelma Washington, Phil Stoner and Al Lipscomb appeared before the council to request the council's adoption or consideration of an all single member district plan, [65] or at least, a ten, one plan?

A Last Monday.

Q How about prior to that?

A No, last Monday. We didn't have a public hearing before then.

Q Right. That is my point. You didn't allow persons before the vote was taken on this eight, three to testify as to what plans they would prefer, you held this in closed session, did you not?

A No, no, it wasn't a closed session, indeed it was not. You have got to understand that when a councilman is elected, he obviously is elected to make decisions that he thinks are in the best interest of the community. And that is what we addressed ourselves to.

The Court asked us to come forth with a plan quickly.

Q Yes, sir.

A And he didn't order us to hold a public hearing on it. We felt we knew how the people felt about it.

Q That is correct.

A Or I never would have been a plaintiff for the — I mean a witness for the plaintiffs if I hadn't thought the majority of the people I represented wanted single member districts.

Q My point is, there were no public hearings conducted before you voted on the eight-three plan now presented to the Court?

A January 20th is when we voted on the resolution. We still haven't voted on an ordinance.

* * *

[70 l.8] PEDRO AGUIREE,

having been duly cautioned and sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. BICKLEY:

* * *

Q And are you an elected city councilman?

A Yes, I am.

Q In the City of Dallas?

A Yes, I am.

Q And how long have you been on the city council of the City of Dallas?

A Since April of '73.

* * *

[71] Q And what is your race?

A I'm a Mexican-American.

Q Now, Mr. Aguiree, the plan as submitted doesn't guarantee of a slot on city council, does it?

A It does not.

Q And what is your opinion insofar as the necessity in the City of Dallas considering the living pattern of the Mexican-American a to whether or not we should have some at-large spots?"

A Mr. Bickley, "my position has been constant throughout my tenure of office, in that I have always believed that it was in the best interest of the Mexican-American community to have a combination plan." I've never made a statement as to which combination was the most appropriae for the Mexican-Americans.

[72] I have voted on various plans, or rather on two different occasions in the council chamber, merely as a reaction of the alternatives that were presented, and "I am firmly convinced that a combination plan of some sort would best serve the interest of the Mexican-American."

* * *

Q We have just had, though, and looked at several different possibilities to see whether or not a continuous composite district could be drawn for Mexican-Americans, have we not?

A We have talked about it in general terms, but I've never seen any alternatives other than the one that I see on the board now, except for a ten, one plan that was mailed to me some

months ago, and that is the only other plan that I have seen.

[73] Q Well, did the ten, one plan have a district that would be what we would call a safe district for a Mexican-American?

A No, sir.

Q Have you seen any plan that anybody has come up with to this point that would actually do that?

A No, sir.

Q The Mexican-Americans represent a very important segment of our community, do they not?

A Well, we certainly think so.

Q There are many others who think so, also.

Approximately 8 percent of the population in Dallas is Mexican-American, is it not, or do you know?

A Well, I've heard 8 to 10 percent, depending on whether you're buying or selling.

Q Somewhere between 8 and 10 percent then?

A Yes, sir.

Q All right. And out of that — and those people live throughout the City of Dallas, do they not?

A Yes, sir.

Q They are pretty well spread. They are not in one area clustered in one area, are they?

A We are pretty well as we'd like to be, but we are spread out.

* * *

[78 l.23] Q All right. The at-large is really their only chance or choice to really get elected, isn't it?

A Well, if we are going to limit ourselves to the [79] two alternatives that we have discussed, the answer to that would be yes. I'm not sure that it is the only alternative.

* * *

CROSS-EXAMINATION

BY MR. HERNANDEZ:

* * *

Q You indicated that you have always favored a combination plan in that the plan that was presented you voted [80] against, did you not?

A Yes, I did.

Q I would like to review for you briefly how it came to be that you got to be the Citizens' Charter Association endorsed candidate to get on the council, and ask you first, if in your opinion you could have won the seat without being endorsed by the CCA?

A Well, the question — the answer to the second question is, obviously, no, I couldn't have been elected without that endorsement and support.

* * *

[81 l.5] Q Let me interject and ask you, people that presently represented all segments of the Chicano community for the most part?

A I think you could say they represented the brown community from all, not only in terms of political philosophy, but geographical because they were there, because I was out of town at the time. But I do know that there were over 65 people because that is the report that I had.

Anyway, there was some other meetings, and I don't know how many, some of which I participated in, again at the First Mexican Baptist Church. As I recall, there were seven candidates came forward to be interviewed by the endorsement committee of the CCA. I was one of those seven.

It was agreed between all those that participated at those meetings in the brown community that whoever the candidate — whatever candidate was selected by the CCA, that we would all support that candidate to make — give him or her the best possible chance to succeed in the general election. And there were two candidates selected. There was an alternate. I was the candidate selected originally. The alternate was Sam Oeraneo.

* * *

[82 l.4] Q Is it your opinion that the only way that a Mexican-American can get elected as it is now, is by being dependent upon the power that be in the city, the slating group?

A Yes.

Q And it is, of course, your understanding that the Citizens' Charter Association, as testimony here has already shown, is the powerful slating group in Dallas?

A It is at this time, yes.

* * *

Q That does, in fact, make the Chicano dependent upon the CCA, does it not?

A Yes, it does.

* * *

[85 l.12] Q Now, in considering what plan is best for the Chicano community, let me ask you if you have seen any plans that guarantee the Chicano the opportunity to participate meaningfully in the election process?

A I have not seen a plan yet.

Q Now, let me ask you in terms of — on direct examination, you testified that the Mexican-American is spread out over the city but within certain pockets or areas; is that correct?

* * *

A That is correct.

Q And there is still a concentration, is there not, of Mexican-Americans in West Dallas?

A Yes, there is.

Q And there is a concentration around the Love Field [86] area?

A That's right.

Q And there is a concentration a little bit further North Dallas, Walnut Hill?

A Yes.

Q There is one over in East Dallas, Bryan, Peak, Haskell area?

A Yes, sir.

* * *

Q All right. Isn't it a fact, Mr. Aguiree, that as far as the Mexican-American in Dallas is concerned, in order to have representation that he must either go to more single member districts so that he can control a district or have such [87] a combination plan that there are an adequate number of at-large's so that the Citizens' Charter Association can be dealt with?

A Yes. And I'd like to qualify that answer if I may. Because when we talk about more at-large positions, my reason for giving a yes answer to that is that I am convinced of having had eighteen months' experience on the council that the needs of the Mexican-American community are going to be taken care of only after the others have had their needs satisfied.

It would appear to me that the more at-large positions that are available, the more flexible the controlling political party is going to have in allocating the spots. Today it happens to be the CCA, and that — you know, next election it may happen to be some other group. When I say that more single member districts would

give us an opportunity — a better opportunity to participate, obviously the most ideal would be to have a council of 950,000 people. Then everybody has a vote and is beholden to no one. So I am sure that a computer somewhere along the line could come up with a number of representatives that would give us eight or ten persons of whatever the council composition happens to be, and within that context, I am going to answer your question, yes.

* * *

[88 l.5] Q Do you have an opinion as to what the Chicano wants in terms of his ability to participate in the electoral processes of electing city councilmen?

A Yes, I think that basically all the Mexican-American is asking for is the right to enjoy our constitutional right to have an opportunity to participate in the election process, and that is all we are after.

We are after — that is our goal, and we would like to be able to do so without having to negotiate just to have an opportunity to play.

Obviously, when you return it reduces the reputation of almost a million people down to a group of eleven. There is a lot of compromise that has to be made. In our particular case with 8 to 10 percent of the population, it forces us to negotiate just for the opportunity to run. And so to that extent, what I feel that the community wants and needs is a system by which we can enjoy our constitutional right without having to negotiate with anyone.

Q In other words, the Chicano in the City of Dallas wants to be independent of both the Citizens' Charter Association as a necessary endorsement and/or any other groups' endorsement?

[89] A That is our goal.

Q You feel that — do you know in terms of the varying plan here of the eight, three, do you know of any plan that might

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accomplish that?

A Not within the context of this type of thing. We have not had the time to really look into other methods of electing our representatives. We haven't had the time.

It is my understanding that other places have used a totally different method of electing their people. And actually, all that we are about here, both black, brown and white, is adequate representation. As far as I'm concerned, we have not even explored the possibility of proportionate representation yet, which as my understanding is used quite successfully in Europe and has been used in other cities in this country.

* * *

[90 l.4] Q In other words, at this point in time, references as far as the Chicano in Dallas is concerned, the Little Mexico area which did exist before the tollway came through, and areas like that that have been eliminated, it seems that by doing so they are being punished for assimilating because we are not going to have representation under the eight, three plan, is that correct?

A It seems that way.

Q You mentioned a proportionate representation. Is there not an electoral process whereby you could take, for example, eleven potential council members and have accumulative voting very much as minority shareholders in a corporation do?

A It's my understanding that this is politically feasible, and in fact, legal. We have not had the opportunity, or at least I haven't had the opportunity, to become completely conversant with the details of such a system. But I do know that it offers an alternative that we need to look at before we decide on any plan.

* * *

[91 l.16] Q (By Mr. Hernandez) Well, let me ask you this, Councilman Aguiree, were you the one that sponsored the

resolution that the Judge has referred to in his Order citing a dual system that existed?

A I offered that resolution, yes.

Q And was that not as a direct result of the impact that this city had had on Chicanos?

A That's right.

Q Do you have an opinion as to whether that resolution would have even been offered had you not been on that council?

[92] A All I can do is look at the record and there have been other incidences that could have provoked such a resolution and none was offered.

* * *

[93 l.20] THE COURT: Councilman, let me ask you this question:

With about 850,000 people in Dallas, according to the '70 census, and this is what we have to go by at this time, as I view the exhibit before me which is the plan that is being offered by the city, the eight, three plan, I certainly can observe that the Mexican-American population [94] is certainly throughout the entire city, I mean, every year, every one of these districts has a percentage, and I know that the largest percentage is some 20 percent.

As I understand your testimony, the only way from the standpoint of single member districts, there would have to be an increase to the point that you would have even a reasonable chance of electing your own choice if you so decided it that way — would be districts down somewhere 40 or 50,000 at the most, is this correct?

THE WITNESS: Yes, I believe that, Judge.

THE COURT: In other words, there is not any contiguous

area. In other words, otherwise you'd have to jump from this pocket to this pocket to this pocket?

THE WITNESS: That's right.

THE COURT: I was not quite clear as to the other method that you had indicated.

THE WITNESS: Proportional representation?

THE COURT: Yes. On how this would be done.

THE WITNESS: Well, Judge, I am not an expert. I've had the benefit of about one hour's discussion with Dr. Fells, political scientist from the University of — East Texas State University, and I haven't had the time to become completely conversant, but it is my understanding from the information that I get from him is that this system is used quite successfully in Europe, and not in [95] an effort to share representation to various races, but to share representation for the political parties since they have more than two, usually.

So — and that it has been used in New York and it has been used in Cincinnati.

I don't know — I know why it was discontinued in New York, but I don't know why it was discontinued in Cincinnati.

THE COURT: I misunderstood your word on proportion. I was not clear as to what you said. I understand it now. But I don't want to cut you off. Go ahead.

THE WITNESS: So — and that is why I think it's imperative that that alternative be at least looked at seriously, because I think this is what all of us here are after, and that is adequate representation. And our concern is to have our day in court, regardless of whether it's here or the city council or the county courthouse. And I haven't seen from my point of view a real conserted effort to review and study the other alternatives.

As far as I can see, we have limited ourselves to that method with which we are most familiary, and I think, understand that. I can appreciate the fact that the plans that have been offered have been on a white and black basis with the Mexican-American community totally excluded from the discussions.

[96] We, on the other hand, have had to develop our expertise from scratch, and we just have not had the time to prepare a plan. I wish that I could have an alternative to suggest, but I do know there is other alternatives we have not discussed yet.

THE COURT: All right. I'm clear. I didn't understand what type of representation.

* * *

ONESIMO HERNANDEZ,

having been duly cautioned and sworn, testified as follows, to-wit:

* * *

[103 l.2] Q All right, sir. Have there been any groups besides the Citizens' Charter Association that have ever sponsored a successful Mexican-American candidate?

A Not to my knowledge.

Q Do you have an opinion whether this is any group in existence right now that can successfully sponsor a Mexican-American candidate, other than the Citizens Charter Association?

A Not to my knowledge.

Q All right, sir. So at the present time, that is what we are talking about, that is the hook-up or the tie you need right now?

A That's right.

* * *

[107 l.24] Q And either way, I've suggested to you whether the Chicano or Chicanos are selected for an at-large seat or [108] single member district seat, it would at this time have to work with the Citizens' Charter Association in order to win; is that correct?

A We work with everyone.

Q Well, you will have to have the endorsement and backing of the CCA for this upcoming election, will you not, if you're going to be successful?

A Yes.

Q This is true, whether you're talking about this eight, three or any plan that would offer some at-large feature in combination with a single member district feature. You're going to have to continue to have the cooperation and backing of the CCA?

A Under the current structure, yes.

Q And particularly with the one we are talking about right here, Defendant's 92, which is the proposed signing member district plan by the City of Dallas?

A Yes.

Q What guarantee do you have that the CCA will continue to support a Mexican-American candidate from either an at-large or a single member district position?

A The same guarantee that we have that anybody else would support us.

Q So that basically, are you telling the Court that you don't know from time to time or that you haven't now?

[109] A Our existence depends numerically, we are such a small number, our distribution is such that it is only through negotiation and a developing of revenues with one group or another that we can succeed at this point. I have no insurance that

the CCA would be the source that we would have to go to to succeed and other organizations. They have no commitments, neither does the other minority communities have a commitment.

Q So there is no guarantee?

A No guarantee.

And for the time being, at least, the Citizens' Charter Association is the one most powerful slating or backing group in the City of Dallas in terms of its elections?

A Yes.

MR. CLOUTMAN: No further questions.

CROSS-EXAMINATION

BY MR. HERNANDEZ:

Q Dr. Hernandez, you're the same Onesimo Hernandez who is an intervenor in this lawsuit, are you not?

A Yes.

Q And you intervened in the lawsuit because of what reason?

A Because at one stage in the evolution of this lawsuit I thought that we had Chicano representation. And when the knowledge came to us that we did not have Chicano representation, I thought that it was imperative that we present our case.

* * *

[111 l.20] Q And I believe you told Mr. Cloutman, here, there is no guarantee that the CCA will in the forthcoming election or any other election continue to have any type of commitment to the Chicano community?

A That is correct.

Q Now, would you agree with Councilman Aguiree that [112] what the Mexican-Americans or the Chicanos in the

City of Dallas want is an opportunity to participate in the political processes and be independent in doing so?

A That is correct.

Q Now, he doesn't get this independence, does he, if he's required to rely upon the Citizens' Charter Association's endorsement in order to win?

A That's right.

Q On the other hand, you have looked at the other plans — let me ask you this: this particular eight, three plan numerically forecloses the Chicano from being able to run from a single member district and be elected, does it not?

A It is my impression.

Q Does the only opportunity that the Chicano has is by running from one of the two at-large?

A That's right.

Q Considering that the third one is for mayor?

A Yes, sir.

* * *

[114 l.20] Q I believe you heard Councilman Aguiree testify that in his opinion that the problem that was being addressed here in terms of representation in terms of single member vis-a-vis at-large, that the approach by the city plan as well as by the plans that the plaintiffs have put forth that you have seen, that that approach is basically a black-white approach, [115] would you agree with that?

A Yes.

* * *

[116 l.3] THE COURT: Doctor, let me ask you just a question or two.

You said that the eight, three system reduces the chances of

Mexican-American representation. You mean it reduces it from the present all —

THE WITNESS: Present system, yes.

THE COURT: Now, with regard to the ten, one or eleven, zero single member district, you're saying that this would even further reduce it?

THE WITNESS: Yes.

THE COURT: In other words, it is your opinion and your testimony that the more at-large districts you have, the more opportunity the Mexican-Americans have?

THE WITNESS: Under the numerical structure that we have now.

THE COURT: Or there has got to be a change in your government structure that would greatly increase the number of council positions before you could have a numerical chance?

THE WITNESS: Yes, sir.

THE COURT: At successful races in districts?

THE WITNESS: Yes, sir.

THE COURT: All right. That is what I wanted to be [117] sure I understood.

* * *

WES WISE,

having been duly cautioned and sworn, testified as follows, [118] to-wit:

DIRECT EXAMINATION

* * *

Q Mr. Wise, are you involved in politics in the City of Dallas?

A Yes, I am.

Q In what capacity?

A Mayor.

* * *

Q And at that time, do you recall any directions being given to the city attorney's office to draw them so that there would be some blacks on there or draw them so that certain [119] other groups would have certain representation, or was it simply to draw them equally?

A Not to my knowledge. I think it was to be drawn equally and as fairly as possible.

Q And at the time that the plans were presented to the council, were there more than one presented?

A Yes, there were.

Q Did some of the city councilmen have plans of their own?

A Yes, and we all had the opportunity to submit plans if we wished to.

Q Yes. And were they thoroughly discussed before this plan was finally adopted?

A Yes, they were.

* * *

[123 l.7] Q All right. And — now, Mayor Wise, I believe you were there when the vote was taken as to whether or not the resolution would be passed and sent on to the Court.

A Yes, I was.

Q And I believe at that time there was some question as to whether or not certain ones voted yes or voted no because of the courtesy due other councilmen under the council's policy of not voting on a resolution on the same day in which it was presented; is that correct?

* * *

That is correct.

Q Did that have something to do with the vote that day?

A That was my impression. And sometimes my impressions are mistaken, Mr. Bickley, but my impression was that this was — well, obviously, Mrs. Harrison changed her vote for that very reason. The choir ruled and then there was some discussion and then we called upon you and you reiterated what Mayor Pro Tem Allen and I had said, that the mayor had made it quite clear he wanted this plan back immediately, and so that is when we voted [124] it in.

Q You mean that the judge wanted it?

A Excuse me. I meant the judge. I almost promoted you, Judge, I'm sorry.

Q All right. And so it did have involved in it some of the council procedures itself rather than just straight outright vote?

A They stated so, yes.

CROSS-EXAMINATION

BY MR. HERNANDEZ:

Q Mayor Wise, are you familiar with the explanation of the council from Number 9 tt Number 11?

A From 9 total members to 11 total members?

Q Yes.

* * *

A Yes, I am.

Q That was done primarily to accommodate the black community, was it not?

A Probably, I would say so, yes.

Q That is how George Allen got on?

A Yes.

Q Do you know of any proposed explanation of the council

in order to accommodate the Chicano community?

A No, I don't. I haven't heard it discussed.

[125] Q Not unheard of, though, in the annals of city politics?

A Oh, no.

Q For the council to expand itself in order to accommodate a minority representative?

A Yeah, true.

* * *

[126 l.22] Q (By Mr. Hernandez) Let me ask you this: In terms of this possibility of having a member, one would be from a single member district, wouldn't that Mexican-American have to tie himself with either the majority community or the black [127] minority community in order to be elected?

A Out of a single member district?

Q Yes.

A I think, looking at the practical, political view, you'd have to say that that would be helpful, certainly. I don't know whether it would be certain. Again, looking at the practical, political picture there, though, Mr. Hernandez, I don't think the CCA would be at all smart in not having at least one Mexican-American on their slate. And if I chose to endorse, say, eight people, I don't think I'd be very smart if I didn't have at least one Mexican-American that I endorsed, if there was a good candidate, looking at it from a practical, political standpoint.

Q But, the point is, that it makes the Chicanos dependent upon whoever is doing the slating.

A Well, I think that has been to a certain extent true, yes.

Q Unless there is a plan whereby the Chicano can exert his own ability to elect his own representative?

A That is not my opinion, frankly.

Q Now, isn't it somewhat inconsistent to say that the Mexican-American can be at-large and represent the Mexican-American community while saying at the same time this person is to take an overall — overbreadth view of the city?

A No, I don't think so. I think Councilman Aguiree [128] does that. I think you can take both the overall view and the view of the Mexican-American. He does a very capable job there.

Q I believe the Mexican-American came up to the city council last week to discuss single member districts and you referred them to the Court here, did you not?

A Yes.

Q I take it that it is your opinion that this is the forum where the structuring of the single member district or of a constitutional plan should take place?

A That was our city attorney's advice and I concurred in that advice, yes. I think I should point out here that all council members — council persons had input from both the Mexican-American community and minority community for many years on this subject, so we are well informed on the subject, I think. I've had many of my Wednesday meetings.

* * *

[133 l.10] MR. HERNANDEZ: In response to the Judge, Mayor Wise, I believe I heard you say that the single member district was going to benefit Mexican-Americans. And under the plan, the eight, three as it is proposed, the highest concentration of Mexican-Americans in any district is in District 2 at 20 percent. As a political reality that Mexican-American could go out and wear out his haratchis and still not ever win, couldn't he?

THE WITNESS: If a mayor who won overwhelmingly in an election went into that district and helped him campaign and went to the shopping centers with him and to the Sunday Schools

with him and to the community centers with him and said, "Let's elect this man, he will help me when you elect me mayor," I think thee is every possibility that he could be elected with only 20 percent.

MR. HERNANDEZ: I think that is the second part of [134] the question. The first part of the question is, if he doesn't have the good graces of the mayor, he couldn't get elected.

THE WITNESS: I don't — well, I think being practical, I would say his chances were greatly lessened. I don't think it is a matter of he couldn't be elected, no. But it would be lessened, no question about it.

MR. HERNANDEZ: Well, keeping in mind that I believe the prior testimony has shown that voting patterns are such that black Americans tend to vote for black candidates and white Americans tend to vote for white candidates and brown Americans tend to vote for brown candidates, if that holds true, his chances would be extremely small in trying to get elected?

THE WITNESS: Frank, I sound like I'm arguing with you here, but I had the same strong percentage in the black community in this last election that I had in the white community and George Allen had the same strong support in the white community that he had in the black community. And if you take those two examples, I don't think that would be true.

MR. HERNANDEZ: I don't mean to be argumentative, either, but I don't believe that there was a Mexican-American candidate and that makes a distinction.

THE WITNESS: I thought you said black and white, [135] I misunderstood you. I think obviously when you don't have a strong population advantage in one of those districts, it's going to lessen your chances, no question about that.

* * *

GEORGE SCHRADER,

having been previously sworn, testified as follows, to-wit:

* * *

[155] Q And in terms of the structure which dictates the results, if the Chicano — and if a plan is structured in such a way that he must be dependent upon a slating group, he would always be, beholden to that slating group, would he not?

A I would think if he viewed — he won on that basis, he'd want to work with that basis, yes.

Q And that might, in fact, limit the type person or individual that might be acceptable to a slating group such as the CCA; is that correct?

A Yes, uh-huh.

Q So, in effect, we might get a CCA type Chicano, so to say? Do you agree with that?

A Yes, sir, I agree with that.

* * *

[159 l.10] Q Now, you're familiar, are you not, with the fact that Dallas city council at one point expanded itself, had a charter election and expanded from nine to eleven, you're familiar with that?

A Yes, sir.

Q And that was done primarily to accommodate the black community, was it not?

A I really don't know the reasons for that. It was to enlarge the council and increase the representation, but whether it was to respond to racial need, I'm not sure.

Q Well, let me ask the question this way, then.

Prior to the expansion, there had never been a black American elected to the council?

A That's right.

Q And subsequent to the expansion, there was a black American elected to the council?

[160] A Yes. Wait, no. Elected? Wasn't the first black to serve on the council — there was a predecessor to Councilman Allen.

Q He was elected out of District 8, which is not the constitutionally unaccepted at-large form. So the question is that the city council has, in fact, expanded itself, so to say, to meet the requirements of minority groups?

A That is the result.

* * *

[171 l.5] ROOSEVELT JOHNSON, JR.,

having been duly cautioned and sworn, testified as follows, to-wit:

DIRECT EXAMINATION

* * *

[178 l.15] Q Were you aware there has not been a black person elected to the city council who wasn't endorsed by the Citizens' Charter Association?

A I haven't searched it out, but I would assume this is probably right.

Q And, in fact, were you aware that there has never been a minority member on the council, both black and brown, who wasn't endorsed by the Citizens' Charter Association?

A Quite aware of it.

* * *

[180 l.22] Q And I take it that you would not foresee given the present political climate that a black person would be elected at-large?

A It would be very hard.

* * *

[185 l.16] CROSS-EXAMINATION

BY MR. HERNANDEZ:

* * *

[187 l.4] Q Now, when you use the term "minority" in talking about the two districts that could be elected, whee minorities could get elected under this proposed eight, three plan which you have adopted, are you not using that term synonymously with black Americans?

A I would certainly feel that because it's predominately black.

Q And so in terms of, I believe you said that it would be very hard to elect a black person at-large in the City of Dallas under this eight, three plan. Wouldn't that same hold true for electing a Mexican-American or Chicano at-large?

A I would feel that it would.

Q And you certainly know from your political involvement tha it costs an awful lot more to run an at-large election than it does a single member district election?

A Yes.

Q Now, you're familiar enough, are you not, Mr. Johnson, with the housing patterns of the City of Dallas to know that the Chicanos have dispersed themselves throughout the city a great deal?

A Yes.

[188] Q And this is one of the aimes and goals of your organization, is it not, the Urban League?

A Right.

Q And because the Chicanos have dispersed themselves

throughout the city, he doesn't have a particular area where he is concentrated at this time, does he?

A That is — I believe that is true, yes.

* * *

Q (By Mr. Hernandez) Do you know of any Mexican-American that has been elected to the city council without the support of the Citizens' Charter Association?

A No.

* * *

ADLENE HARRISON

[205 l.4] Q Don't you feel, Mrs. Harrison, that minority groups would be in fact taking a chance to assume that they could, in fact, have a shot at one of those three at-large seats?

A I would have to answer yes.

* * *

TRANSCRIPT OF PROCEEDINGS

VOLUME X

[6] DR. DAN WEISER,

having been duly sworn, testified as follows, to-wit:

* * *

[63 l.16] Q All right. Have you studied the Citizens Charter Association and their effect on the City Council elections and their whole slating process?

A Yes.

Q All right. Do you have an opinion from your study and from your examinations as to whether or not the changeover from an at large to an 8-3 system would have any impact at all on the CCA slating process?

A I think it has several effects, as I believe I testified earlier, that within a single member district I think [66] their effect would be greatly lessened, it would have a much smaller effect, any slating group has a much smaller effect within a single member district.

Now what that means is that, if you were trying to retain a majority on the council and you look at districts under, say, let's take this, well, under this plan, under the 8-3 plan that we have now, that you could reasonably expect candidates endorsed by the CCA or favorable to the CCA or from past voting patterns, fairly easily taking 3, 4 and 5, those districts. The District 7 which is sort of the Pleasant Grove District is the most — has in the past been the most anti-CCA District area in the city.

Q In terms of voting returns?

A In terms of voting returns.

All of these are in terms of voting returns for so-called key elections showing CCA, anti-CCA vote, such as, say, a Wise, Wes

Wise, Avery Mays vote for the mayor a few years ago.

Or the last time a good key would be Fred Zeder, Garry Weber.

Okay. Using those, next the other districts, district — the predominantly black districts also usually vote anti-CCA. Not quite as heavily as 7 would.

Now Districts 1 and 2 are sort of swing, I mean, [67] they're — maybe District 1 — well, they swing. They're not too much pro or anti-CCA.

Q Would this have an effect on the at large seats?

A Yes. Because what you have essentially are three, I think, would be three easy wins. So it would be very important for you to take the three at large seats.

Q And when you say "you," are you —

A I'm talking about the CCA, I'm sorry.

Q All right. Under this analysis, Dr. Weiser, what do you feel from your experience would be the probability of the CCA slating a black or Mexican-American in one of these at large seats?

A I think it would be very unlikely that they would risk it. I mean it would be quite important if it really came down to on the council, they would — they could no longer afford the luxury in one term of slating, say, a Mexican-American as they have with Pedro Aguiree.

Q All right. Now would a black or a Mexican-American from your past experience and from your past analysis of voting returns, have an opportunity or a meaningful opportunity to be elected at large without the CCA endorsement?

A I still have the same opinion about at large elections here within the City of Dallas, that it will follow the past pattern, that it will preclude a black or Mexican-[68]American from winning

any at large seat without the endorsement of the CCA.

Q So under the Defendants' 8-3 Plan, a black or Mexican-American would have very little opportunity to be elected at large, in fact be precluded from —

A I believe in that case the black would be precluded and someone who was identifiable as a Mexican-American by other than a self-identification, I think, would find it very difficult if not impossible.

* * *

[201.24] Q Do you feel that there is any possibility under your analysis from the CCA and the changes that will come about [71] as a result of implementing an 8-3 that the CCA would endorse a black or Mexican-American candidate at large?

A I don't believe that they would.

Q So in fact those three at large seats are completely precluded from minorities?

A I believe so.

* * *

[84 l.7] Q Turning to page 2 of this plan under Section 3, in how many districts would blacks have a majority of the population?

A They would be predominantly black in three districts.

Q And would there be a majority-minority district under this plan?

A Yes. Again District 2, there's been an increase in the percentage Mexican-American to thirty-one percent here, and the black percentage has gone down a little bit to thirty-five percent, and the Anglo percentage has gone down to about thirty-four percent.

Q In your opinion would it be possible for a Mexican-Ameri-

can to run in this district and enjoy some hope of success?

A Yes.

* * *

[170 l.7] CROSS EXAMINATION

BY MR. HERNANDEZ:

Q Dr. Weiser, you're quite familiar with the problem of the Chicanos politically in the City of Dallas, are you not?

A I'm somewhat, somewhat familiar.

Q Well you worked on voter registration plans with them, haven't you?

A Yes, sir.

Q For the past ten or twelve years?

A Yes, sir.

Q Well don't you keep up with the Chicano problems, Mexican-American problems politically?

A I try to but occasionally I get hot letters from people telling me I'm not doing what I should be doing.

Q And occasionally you write them, too?

A That's correct, sir.

Q So you are very familiar with the Chicano problems in the City of Dallas?

[171] A I would have to stick with, I'm somewhat familiar with the Chicano problems in the City of Dallas.

Q Let me ask you then, do the Chicanos have equal access to the political processes in the City of Dallas elections?

A I don't believe that they have the same access that the Anglos do, no, not quite.

Q Is their access more equivalent to the access that the black American has?

A Ummm. That's — gets tougher.

I just — I don't think they're precluded in the same sense that the blacks are here in Dallas. I try to explain that, at least for census purposes, telling who's Mexican-American or not, someone could pass for an Anglo in an election and yet they could be on the census classified as Mexican-American. Whereas I don't believe that too likely in the black community.

Q Do you know of any candidate that would pass as an Anglo that was a Mexican-American that ran and got elected in the City elections?

A No, sir, I do not.

* * *

[173 l.24] Q Do you know of any Mexican-American candidates who have ever run for the City Council that were not endorsed by [174] the major slating groups, the Citizens Charter Association, that were elected?

A No, sir, no, sir, not at all.

Q So in that respect they're exactly like black American candidates?

A That's correct, yes.

* * *

Q Well isn't it a fact that one of the reasons that the Mexican-Americans did not run for City Council positions in the past is because the very nature of the system precluded them from having any opportunity to win?

A I think that's a — it was certainly felt to be that and probably I think that was much more the case, say, in 1960 than 1970.

I base this on the assimilation somewhat.

I just do not think that the pattern of discrimination is as invidious against Mexican-Americans politically as it has been

against blacks in the City of Dallas.

* * *

[179 l.25] Q Would you agree with me that the Mexican-Americans have [180] not been able to have any great ability to participate as black Americans in the political process and that the Citizens Charter Association has restricted the access of Mexican-Americans to the political life of Dallas?

A Well they haven't increased it any more than — I mean there have been two candidates that the CCA has endorsed.

Q Generally hasn't the CCA treated Mexican-American political candidates exactly like they treated black American political candidates?

A Yes. Before a certain date there were no Mexican-Americans put on the CCA slate, just as there were no blacks.

Q Would it be a fair statement to equate the fact that, if they have restricted the political life of black Americans in Dallas, that they have restricted the life of Mexican-Americans in Dallas?

A In that same sense, yes.

* * *

[182 l.8] Q Right. So the Mexican-Americans are dependent in a large manner on the efforts of the dominant white group to begin to run a campaign?

A I think certainly that what happened in the past in City elections, it's so, yes.

* * *

[183 l.18] Q. You heard testimony that there has never been a Mexican-American that was not endorsed by the CCA, ever win, you agree with that?

A Yes.

* * *

[184 l.6] Q So if a Mexican-American, the only way that he can participate in an 8-3 plan is at large, then it would cost him more to run than it would other —

A Yes, enormous. You're talking in terms of eighty thousand, one hundred fifty thousand, two hundred thousand dollars.

Q And traditionally Mexican-Americans, just like black Americans, have not had the where with all or the money to fund this type of campaign?

A That's correct.

Q So in that respect the black American and the Mexican-American candidates in Dallas have been equated on even par?

A That's correct in my opinion.

Q And it would be a fair statement to say that this particular cost operates to further restrict the access of Mexican-Americans to the political processes within the City of Dallas?

A You're talking about under the present system? Yes.

Q Or under the 8-3 plan if the only position that you have is at large?

[185] A Yes, yes. I think that's true.

Q Mexican-Americans have always been considered a minority in Dallas, have they not?

A I believe so, yes.

Q And they are recognizable, identifiable minority?

A Yes.

Q And they have generally received treatment that was given to minorities?

A Again, with my qualifier, that, you know, not to the extent possible.

Q Well a Mexican-American that lived in West Dallas didn't

get any better services than the black American that lived in West Dallas, did they?

A No. That's correct. But historically the assimilation has been easier because it has occurred. Between '60 and '70 there has been more black segregation. Between '60 and '70 there's been a tremendous explosion, it seems to me, of Mexican-Americans throughout the Dallas community.

* * *

Q All right. Now in 1973, did not the City of Dallas recognize the unique problems of the Mexican-American when it passed an ordinance following a rider of 1973 that [186] provided unequal law enforcement, dual justice and these type of matters? That was directly tied to the Mexican problems?

A Yes, sir.

THE COURT: Counsel, that's all in the record. I'm well aware of all of this. That's been in the record three or four or five times. I'm just saying they're repetitious matters. I don't see any need of covering them.

MR. HERNANDEZ: If all counsel are prepared to stipulate that Mexican-Americans are a recognizable and identifiable minority and they have been invidiously discriminated against as black Americans have —

THE COURT: That's not what I'm talking about. I'm talking about this resolution that was passed by the City.

MR. HERNANDEZ: Yes. I want the record clear that that resolution was passed for the benefit of Mexican-Americans primarily. The Mexican-Americans were the ones that pushed this resolution, not black Americans.

THE COURT: That's already in the record.

MR. HERNANDEZ: All right.

* * *

[190 l.11] Q Did you try to create a Mexican-American district by increasing the number of districts and thereby having smaller districts rather than the eighty-four thousand per district as under the 10-1 plan, or the seventeen five thousand per district under the 11-0 plan?

A No, I did not.

Q Now do you have an opinion, that is, the census tract figures were taken, and with the Mexican-American population, that if smaller districts were made, that perhaps you could not have a district that would have more than fifty-six percent?

A Difficult, very difficult.

And the reason is that they only statistics you have cover these four tracts. You can't go within the other tracts.

[191] And the best you can do would be to include just the orange areas and how you got there.

It would be very small, very, very small district. That is, I am fairly convinced that it would be impossible to draw a fifty-six percent Mexican-American district if you had much of any population within the district.

Because the only places where you have over fifty percent Mexican-American are these four census tracts within the City of Dallas.

Q But you didn't try to do that at all?

A No, no, I didn't.

Q You mentioned proportional representation in your direct examination. I'd like to ask you a couple of questions about that.

In terms of the proportional representations, there's many plans that can be utilized to insure proportional representation. And one of the methods would be for all voters, for example if there were eleven people to be elected, to vote eleven times and have —

A Yes, that would be one way.

Q And that way minority groups could accumulate their vote very much like minority stockholders accumulate their vote?

A Yes.

* * *

[192 l.21] Q Did you consider any other type of district such as circular districts where Councilmen might represent an entire circular area around the City?

A I'm sorry, I don't understand you.

Q You started this with a fellow like sort of like a dart [193] board, if you had one district here and then a band of another district, a band of another district, —

A No, I did not consider that.

Again in particular there are many ways to draw these things. I felt constrained to follow almost as closely as I could, starting with the City's resident plan and then add —

Q No magic to that, is there?

A No.

Q Is that correct?

A Well I did it because I felt that I would have the best chance of getting it adopted if the 10-1 plan were to be ordered.

Q I believe you've already testified to this, that the effect of the City 8-3 plan precludes Mexican-Americans from participating in this electoral process?

A I said that this is again without the CCA's endorsement which I find highly unlikely.

But I don't think I'd go as far as preclude. I think I used the word "very difficult." Precludes, I would say would apply to a black candidate and —

Q Well what single member district under the 8-3 plan would a Mexican-American be able to win?

A I don't think that a Mexican-American would have a very good chance, or would have a good chance in any of the [194] districts.

* * *

[195 l.24] Q Would it be a fair statement, Mr. Weiser, to say in light of all of the problems that you have had as an expert in [196] dealing with the Mexican-American and counting the Mexican-American and plotting him, that if the Mexican-American were only let into this lawsuit on the 17th of January of this year for purposes of the remedy, that they would have quite a difficult time in getting the material in order to be able to put on expert witnesses?

A I would think there would be problems.

Q I believe that you testified that you based your districts and also your opinion in terms of the effect of the 8-3 plan of precluding all but two blacks by looking at the plan and last that it was your opinion that citizens should be represented on a percentage of what they are within the City?

A Yes.

Q The Mexican-American approximately sixty-seven thousand and some odd within the City?

A Yes.

* * *

Q And I believe that you testified that the City's plan of [197] 8-3 precludes a black from winning?

A I think so.

Q And it would be difficult for a Mexican-American to win?

A Very difficult. More difficult than under the 10-1 plan.

* * *

Q Aren't Mexican-Americans precluded in District 2 just as black persons are?

A You mean in this —

Q In the 8-3 plan?

A Yes, I think so.

Q Okay.

A Well let me back up. I don't preclude it. Would have a very difficult time.

Q Well I'm going to ask you to explain to the Court the distinction you made between being precluded and very difficult time.

A Well preclude to me seems almost an impossibility, and a difficult time means a difficult time, that the candidate [198] would have to maybe spend more money and in a sense be a much better candidate, have had more experience, various things of this sort.

Q So the Mexican-American would have to be a little more qualified or a cut above the regular candidates in order to have an opportunity?

A Probably, yes.

Q But if he was just the ordinary Mexican-American, he would not have, he would be precluded?

A He would no be able to defeat the white candidate, yes.

Q In other words I take that you heard the term "Super Mex," that if we had Super Mex running in District 2 he might be able to win?

A That's correct.

Q If he were not a Super Mex, he would be precluded?

A I think that's a fair statement, yes.

Q And I believe you also in discussing your knowledge of the Citizens Charter Associaton under the single member district plan, even the City's 8-3 plan, would probably not endorse a Mexican-American at large?

A I think that there would be reasons for them not to, yes.

Q So in effect the Mexican-Americans would not be able to participate from a Councilman's point of view?

A Right. I think that maybe so, yes, sir.

[199] Q And so if the 8-3 plan were adopted by the Court, in effect what would happen to the Mexican-American community would be that, under the plan at large now which has been declared unconstitutional and we have approximately ten percent of the Council representation, under the 8-3 plan the City proposes we would be precluded or not have any representation?

A Yes.

* * *

[205 l.13] Q You don't conceive under the 10-1 plan or the 8-3 plan of a Mexican-American ever being able to win at large, do you?

A Not now. Yes, I agree with you.

Q Would the government of Dallas be impaired if you had a plan that was twenty-one and zero?

A I don't think that the government of Dallas would be very heartily —

Q I take it your answer is no?

A That's correct.

Q The population patterns of the Mexican-American I believe you said has been shifting over the past ten or so years as you've noticed. And in fact they have been assimilating [206]

more into the community, have they not?

A Yes.

* * *

Q In other words if all sixty-five thousand or so Mexican-Americans lived in one area of the City, you could very easily then get a safe fifty-six percent district?

A Most likely, yes.

Q And so it would appear that although in your opinion single member districts do not foster segregation, the fact that the Mexican-Americans have integrated is in effect causing him not to be in position under the single member district plan to elect anyone in a safe district?

A Safe district, yes. And I agree with you that in one sense there's a penalty there. As more assimilation, there is less identification that there is going to be a single spot or residential spot or geographical spot.

Q You don't know of any Mexican-Americans who have ever been deputy mayor or mayor pro tem of the City of Dallas, do you?

[207] A No, I do not.

* * *

[208 l.10] Q (Mr. Hernandez) Dr. Weiser, under the proposed 8-3 plan by the City of Dallas, the Defendant here, this City plan does not allow Mexican-American representation according to percentage of population, does it?

A No, not in my opinion.

Q In that respect the Mexican-American is in the same position as the black Americans?

A Yes.

Q Now are you familiar with the Dallas-Fort Worth Toll Road?

A I've been on it, yes, sir.

Q And you know that it cuts right through what used to be Little Mexico?

A I'm somewhat familiar with that.

Q The Mexican-Americans that live there were relocated or in effect forced to assimilate in some fashion, were they not?

[209] A I would — I believe so, yes, sir.

Q There are no Mexican-Americans that are named Plaintiff in this suit?

A None that I know of.

* * *

[224] ROBERT MEDRANO,

having been duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. JOHNSTON:

Q Would you state your name for the record, please?

A Roberto Medrano.

Q And where do you reside, Mr. Medrano?

A 2346 Douglas.

Q And how are you employed?

A I work for the Dallas Community Action.

Q In what capacity?

A I'm the center director.

Q And what is your race or ethnic origin?

A Chicano.

Q Mr. Medrano, have you run for public office in the City of Dallas?

A Yes.

[225] Q How many times?

A Three times.

Q All right. And briefly when was the first time that you ran and for what office?

A 1972.

Q And for what office?

A Dallas School Board Trustee.

Q And did you run at large or in a single member district?

A I ran at large.

Q Did you win or lose?

A I lost.

Q When was the next time you ran?

A The following year.

Q And for what office did you run?

A The same position, Dallas School Board Trustee.

Q And did you run at large or in the single member district?

A At large.

Q And did you win or lose?

A I lost.

Q In both of those races, were you endorsed by any major white slating group?

A No.

Q Now when did you last run for public office?

A Last year, '74.

Q And for what office did you run?

[226] A Same position.

Q In the Dallas Independent School District?

A Yes.

Q And did you run at large or in a single member district?

A Single member district.

Q And what was the place number that you ran in, in the D.I.S.D. Election?

A Place 8.

Q And could you generally describe the ethnic makeup and location of that district?

A Fifty-one percent minority.

Q And of that fifty-one percent, what were the percentage of black and Mexican-Americans, if you know?

A It's thirty percent black, twenty-one percent Chicano.

Q All right.

A And forty-nine percent Anglo.

Q And did you win or lose that election?

A I beg your pardon?

Q Did you win that election?

A Well I had to go in the run-off but I won the election.

Q Now you say you were in a run-off. Now what was the race or ethnic origin of the person that you were in a run-off with?

A An Anglo.

Q And were you endorsed or was your opponent endorsed by [227] any major slating groups in that race?

A My opponent?

Q Yes.

A No, he wasn't.

Q And were you endorsed by any major slating groups?

A No.

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Q Now you've testified that there was roughly twenty percent Mexican-American and thirty percent black population in that district.

Did you receive any support of any kind by black persons in your race for the D.I.S.D.?

A Yes, I did.

Q And did you receive the support of white persons in your race for the D.I.S.D.?

A Yes, I did.

Q All right. Could you describe for us generally the location of the district from which you ran? I think this map might be clearer.

Does this describe in general geographic terms?

A It's basically District 2 except for the Kessler Park which has been included there.

But if you take the — well, the Kessler Park area, it would be basically the same.

Q All right. And the Kessler Park area, what is its basic racial makeup?

[228] A It's predominantly affluent white area.

Q Could you state whether or not there are basic similarities between the district that you ran from and District 2 that is shown on Plaintiffs' Exhibit 110 which is a 10-1 plan, and Plaintiffs' Exhibit 112 which is an 11-0 plan?

A They're basically the same.

Q Mr. Medrano, you've had occasion, have you not, to view the plans that the Plaintiffs have presented to the Court during the course of this hearing?

A Yes, both plans.

Q The 10-1 and the 11-0?

A The 11-0.

Q And you are aware, are you not, of where you reside within those plans?

A Yes, I do.

Q And what district do you reside in in those plans?

A Same — no, Place 2.

Q Place 2. And has that generally been referred to as the West Dallas area?

A Yes, the West Dallas area.

Q All right. Now based on your experience in politics in the City of Dallas and the Dallas Independent School District, do you have an opinion as to whether or not you would be prevented or precluded from running for City [229] Council in District 2 where you reside on either the 11-0 plan of the 10-1 plan?

A If either plan, 11-0 or 10-1 is adopted, I'm considering resigning from the Dallas School Board and running for single member district.

Q So it would be attractive to you that you would consider running for either one of those —

A Yes, very. They're basically the same.

Q Now has anyone guaranteed that you would win an election in that district?

A No. There's no way you can be guaranteed any position.

Q Were you guaranteed victory when you ran for the Dallas Independent School District Board of Trustees?

A No.

Q Mr. Medrano, there has been discussion here this morning as to how a Mexican-American or a Chicano would be elected to

office under any of the three plans that are before the Court at this time.

Would you consider it necessary to form a coalition with one or another of the other ethnic or racial groups that exist in the City of Dallas in order to win?

A I don't believe in allegiance or any type of loyalty to any type of coalition form.

Q And how would you consider it possible to be elected?

A Just be a representative of the people, sell your platform, [230] what you stand for, be responsive.

Q Did you run for Dallas Independent School District on the basis of racial appeals?

A Oh, no, definitely not.

Q And just for background information, Mr. Medrano, have you ever been associated with in any way the Citiznes Charter Association or the CCA?

A No, I haven't.

Q Have you ever sought their endorsement or support?

A No, I haven't.

Q Would you ever contemplate seeking their endorsement or support?

A No.

Q Now you've also seen what the City has identified as their 8-3 plan.

Do you realize where you would reside within that plan? That would be Defendants' Exhibit 92.

A Yes. Place 2 is where I would be.

Q You've also heard, have you not, Mr. Medrano, testimony that it's indicated to be very difficult for a Mexican-American to

be elected from that Place?

A Oh, most definitely. A Mexican cannot get elected to any one of those districts.

Q Do you believe that it's possible for a Mexican-American to be elected at large in the City of Dallas if he is not [231] endorsed by a major slating group such as the CCA?

A He cannot be elected, not unless he's endorsed.

MR. JOHNSTON: Pass the witness.

CROSS EXAMINATION

BY MR. BICKLEY:

Q Mr. Medrano, 1972 you ran for the School Board at large?

A Yes.

Q And at that time you ran at large, what age were you in 1972?

A Thirty.

Q And what had you done in the community prior to that time to give you name identification?

A I worked within the community as a community organizer. I was a neighborhood senate director which I still held the position two years ago.

Basically the job description of that position is to communicate with community, come in contact with the community and hear their grievances, their plight, and mostly address their needs through a community action program.

Q What did you do before you were working with the DCCAC?

A Prior to '68 — I came to work for the DCCAC in '68.

So prior to that I was working for Ling-Temco-Vought.

[232] Q And what other community work have you done?

A Basically volunteer work, touring, any way I can help the community, in reference, any type of —

Q Been involved in government of any kind to prior to 1972?

A Prior to 1972?

Q Yes.

A No.

Q And actually for awhile the DCCAC from 1968 and 1971, along in there, was kind of a controversial organization for awhile was it not?

A Basically who?

Q Was a controversial organizaition?

A The way the media played it up.

Q Yes, that's what I mean, the way the media played it up and the way them made it look to the community as though it was rather controversial, is that correct?

A Yeah, media.

Q So being associated with it was not exactly a political plus in 1972, was it?

A I don't know how to say.

Q Well you say that you know when you can win in a district and when you can't, Mr. Medrano.

I assume you know what the political pluses are and the minuses are, don't you?

A Yes, sir.

[233] Q All right. So being associated with that, in trying to run at large was trying to carry a burden on your back, so to speak, and get elected?

A Oh, definitely.

Q All right. So it was not really in the cards for you to get

elected at large trying to carry that burden for a first time around, was it?

A I wouldn't know what to say.

Q How many votes did you get?

A Approximately 9.9 percent of the total populous vote.

Q Of the total vote?

A Yes.

Q All right.

A About thirty thousand votes were cast at that year in '72.

Q And you got about three thousand?

A Three thousand votes at large.

Q At large?

A At large. Because we were involved, the election went into a run-off.

Q You were not in the run-off?

A No, sir, not in the run-off.

Q All right. How much money did you spend on that campaign in 1972?

A Oh, approximately nine hundred, maybe a thousand dollars.

Q And that was to run at large for a district the size of the City of Dallas?

A That's not very much money. Couldn't afford it.

Q All right. Actually a thousand dollars, that was only about thirty-three cents for each vote you got, wasn't it?

A I'm not very good at math.

Q All right. In 1973 you ran at large again, did you not?

A Yes.

Q What had you done between the time in 1972 when you ran at large and 1973, to give you any more name identification and to be better known to the people throughout the City of Dallas in the whole school district?

A I began relating to other communities, the South Dallas area. I never foresaw the single member district concept in the D.I.S.D., in other words wouldn't have thought about it.

And I was estalishing name identity across the City with South Dallas, Pleasant Grove area, North Dallas. But it was very — it was very difficult being a member of the minority.

Q It wasn't too difficult in the South Dallas area, was it? That is a minority area, isn't it?

A I was establishing good rapport in the South Dallas area.

Q With the people at the Crossroads Center?

[235] A Right.

Q And those that were working there?

A Yes.

Q And what were you doing in particular to create this rapport with these people?

A I had received a promotion with the community action program that was responsible for the total overall of the five neighborhood centers which are encompassed the North, South, East, West and the Oak Cliff area.

I received a promotion in '71 from the West Dallas area to the umbrella that covered five total community action programs which covered the whole county.

Q And you're employed by federally funded organization, are you not?

A At the present time, yes.

Q And were at that time?

A Yes.

Q Did you get any opinion from anyone as to whether or not that might have been a violation of the Hatch Act for you to become involved —

MR. JOHNSTON: Your Honor, I object to this. It's hardly relevant and prolongs the inquiry. If he can tie it up —

MS. DEMAREST: It's not a violation of the Hatch Act.

[236] THE WITNESS: Just one at a time.

MR. JOHNSTON: And in fact it's not a violation of the Hatch Act.

THE WITNESS: I don't mind answering.

THE COURT: I don't see the materiality.

MR. BICKLEY: All right. I just asked if he did. I'm sorry.

THE WITNESS: I did check it out with the O.E.O. official from the National office.

Q (Mr. Bickley) I assumed you had. That's the reason I asked.

A Yes.

Q And they allowed you to do this?

A Yes.

Q All right. And then, these people that you were actually talking to and making acquaintance with in the South Dallas area were the blacks in the main there, weren't they?

A Yes.

Q And then in the Pleasant Grove area, what group of people?

A Talking mostly Jewish people.

Q And then what other areas were you working with?

A North, some of the what I would consider some of the white liberal areas.

[237] Q All right. Then you were making some contacts with the blacks and the Jewish and the white liberals at that time?

A That's true.

Q All right. Then in 1973 you ran at large.

How many votes did you get at that time?

A Oh, about a thousand votes, about nine hundred and eighty something.

Q You mean less than you got in 1972?

A There were more candidates. In '72 for the record there were only three of us. The CGS or the dominate — the same thing, the dominant slating group that controls the School Board. And then we had LEAD candidates and then myself. So there was three candidates.

Q You were the independent?

A Yes, sir, I was the independent.

Q All right. And then in 1973?

A I can't recall how many candidates there were. I think if I'm not mistaken I think there were nine candidates if I'm not mistaken.

Q And did CGS have a candidate —

A Yes.

Q — in your race?

A Yes.

Q And did LEAD have a candidate in your race?

A I can't recall, I can't recall.

[238] Q I think maybe they did not, did they, in that area?

A I can't recall.

Q All right. And then the rest of you were running as independents?

A Yes.

Q All right. And how much money did you spend on a race at that time covering the whole School District?

A Based on that experience, approximately two hundred dollars.

Q All right. Then you ran again in 1974. You ran three consecutive years, didn't you?

A Yes.

Q In 1974 when you ran, you ran from a single member district?

A In '74, yes.

Q And when you ran from a single member district, how many votes did you get?

A I can't recall the first go around. I had to go in a run-off. I was running against — I did take forty-six percent of the populous vote.

Q The first go around?

A Yes. Made me go into — I didn't get the majority, the fifty-one plus, I had to go in the run-off.

Q And then you went into a run-off?

A Yes.

Q It was a rather light turnout, though, wasn't it?

[239] A In my previous studies in the school politics, the voter turnout, usually the run-off is less. The first vote that's cast of that individual is usually cast with his candidate.

After it goes in the run-off, that individual is no longer considered, you know.

Q Actually the total vote cast in the single member district was less than eight percent of the total registered voters, wasn't it?

A I never have done an analysis on it.

Q How many votes did you get?

A Eight hundred.

Q Eight hundred. And that was fifty-one percent or a little over?

A Fifty-one percent. About fifteen hundred votes were cast.

Q About fifteen hundred votes cast?

A In the run-off.

Q And what is the population in that Place 8 that you were running for there?

A I have no idea.

Q What?

A I have no idea.

Q You mean you ran a race and you don't even know how many people there are there or how many you represent?

A That's true.

Q Do you know what their problems are, Mr. Medrano?

[240] A Yes, sir, indeed. I attend mostly all P.T.A. meetings and deal with the problems.

Q Do you have any idea how many people there are?

MR. JOHNSTON: Your Honor, he's answered that question. This is the third time the question has been asked.

THE COURT: Well, that's the question I was going to ask if he hadn't. I want to know how many people are in District 8.

MR. JOHNSTON: Your Honor that plan is in evidence and —

THE COURT: Well, can you just state to me how many are in it?

MR. JOHNSTON: I'd have to look at the exhibit, Your Honor.

THE COURT: All right. Look it up while he's doing this. I want to know.

Q (Mr. Bickley) Then you say that basically, you think, the same as District 2 under the 10-1 or 11-0 plan?

A It's basically the same, yes.

Q What were the real issued in your 1974 campaign?

A The '74 campaign?

Q Yes, the '74 campaign?

A Well, salary teacher increase and no property advalorem [241] tax increase, those were my two major ones, which I have cast my votes on, the taxes have gone up and the teachers increase, I voted in favor of both of them.

Q You were on the losing side of those votes, weren't you?

A We still are.

Q I believe you said there was no guarantee to anybody in any district that they can get elected?

A No.

Q That's politics, isn't it?

A That's true.

Q Now you represent your area well, do you not?

A I think I do.

Q All right. Then you are not one who believes that a Mexican-American cannot represent whites, blacks and Mexican-Americans altogether, are you?

A Repeat your question.

Q I say, you believe that a Mexican-American can represent whites, blacks and Mexican-Americans all, don't you?

A That's true.

Q Do you believe that a black can represent Mexican-Americans and whites as well as blacks?

A Yes.

Q And whites can represent Mexican-Americans and blacks as well as whites?

A I question that.

[242] Q You question that?

A Yes.

Q So the Mexican-Americans and the blacks have something specific that they can do for the whites that the whites can't do the same for them in return, in your opinion?

A Yes.

Q Did you make these ideas known in your race, Mr. Medrano?

A Yes, I did.

Q Do your votes on the School Board reflect your views?

A No.

Q What views do they reflect?

A They're diluted.

Q What do you mean by that?

A Whenever you've got an issue or proposal, it's never taken into consideration, it's referred to committee and it dies there.

Q I know. But your vote, I'm not talking about what anybody else does, I'm talking about what you do, reflect your views?

A It votes — I cast my — it's on record.

Q Well Mr. Medrano, I don't think you understand me. I'm saying, do you vote your convictions?

A Yes, I do.

Q And one of your convictions is that whites cannot represent blacks and Mexican-Americans?

[243] A What are my convictions?

Q I say, and one of your convictions is that you've just testified to is that whites cannot properly represent blacks and Mexican-Americans, is that correct?

A I would say it depends on his attitude and his philosophies and his — it depends.

Q Are you changing your testimony?

A No, I'm not changing my testimony.

Q Well didn't you testify a minute ago that whites cannot represent Mexican-Americans and blacks properly?

A Whites?

MS. DEMAREST: Yor Honor, I object to Defendant — I think he's stated his answer, that he questioned it and I don't think he's said definitely yes or no, and I think counsel is being argumentative.

THE COURT: Well go ahead and — there is some misunderstanding here in my mind at this point now. I understood him to say one thing one time and something else now.

MR. BICKLEY: That's all I want to know, Your Honor. I'm just trying to get the facts. If he'll tell me one way or another because I've understood him to testify both ways.

THE WITNESS: Well it's just like saying I — I could — I could live more comfortably if Garry Weber [244] represented

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me than Gilmore, you can go from there. I could live with Mrs. Harrison representing me than another representative.

Q (Mr. Bickley) And wouldn't you likewise think that it would be true that some of the whites could live easier with some other Mexican-American representing them than maybe you?

A Oh, yes.

Q All right. So that thing crosses all lines, doesn't it?

A Yes, it does.

Q All right. That's what I wanted to get, I wanted to be sure that we got that point. Thank you.

MR. BICKLEY: No further questions.

MR. PAUKEN: Your Honor, just a couple of quick questions.

CROSS EXAMINATION

BY MR. PAUKEN:

Q Mr. Medrano, you've indicated you have been associated and you continue to be associated with the Dallas County Community Action Committee and as such you've become familiar with the South Dallas area as such.

Do you consider South Dallas an area that has certain community interests as such?

[245] A Yes, it does.

Q You see here what's been marked as Plaintiffs' Exhibit 110 District 6.

Does that District 6 as it appears on this map look to you to be South Dallas as you know it?

A I couldn't answer that. I see it's 9, 8 and 6 in South Dallas and part of 10.

Q All right. In other words part of 8 census tract 34 and 40 would be considered part of South Dallas, is that not correct?

A Yes, 34 and 40.

Q All right. Parts of 10 census tract 28, 25, 26, 24, 23, those would be considered parts of South Dallas, would they not, Mr. Medrano?

A I'm more familiar with streets. Could you name the streets.

Q Okay. If we're talking about the Haskell and Ring area, for example.

A Haskell and Ring, I would consider that East Dallas.

Q You would consider that East Dallas.

What about the area near Fair Park, the area slightly north of Fair Park, would you consider that part of South Dallas?

A Name the streets.

Q Stonewall Street.

A I'm not familiar with Stonewall.

[246] Q Fletcher Street. Harry Street.

A Harry, I would still consider that — that's a toss-up.

Q Okay. Let me ask you this: Looking at what is part of District 6 in Plaintiffs' Exhibit Number 10, census tracts 9101, 9102 and 9301, would you consider those census tracts as part of South Dallas or as part of Pleasant Grove?

A Part of Pleasant Grove.

Q Okay. That definitely would be part of Pleasant Grove. Those are areas that are east of the natural boundary, I believe Second Avenue and also a railroad track?

A Yes.

Q You would definitey consider them part —

A Yes I would not consider them part of South Dallas.

MR. PAUKEN: Thank you. No further questions, Your Honor.

THE COURT: Let me ask you a question here, counsel.

MR. PAUKEN: Excuse me. I was referring, and I thought I made it clear, to Plaintiffs' Exhibit 110 which is a single member district 10-1 plan that was offered into evidence and it's a census tract map and I was referring in the numbers I gave to a particular census tract cited on that map.

THE COURT: Let me ask you, counsel, just for my [247] own clarification: Is it your contention then that this Plaintiffs' Exhibit 110 which is the 10-1 plan, is it your contention that districts 10, 6, 8 and 9 dilute the South Dallas area and also eliminate common interest?

MR. PAUKEN: Right. My contention is that the black vote has been diluted particularly with respect to District 6 by carving it up and putting parts of the black vote in other districts, and that further that the community of interest varies that fall within South Dallas in terms of communities of interest have been placed in districts other than District 6 which we heard testimony to the effect is supposedly the South Dallas district.

THE COURT: All right. Now what is your contention relative to the 8-3 plan with regard to Districts 6 and 8?

MR. PAUKEN: My contention is, Your Honor, is we favor a 10-1 plan.

THE COURT: I understand this.

MR. PAUKEN: But with respect to District 6 on the 8-3 plan, that does include more of the areas, even though you're dealing with larger population, more of the areas that we consider integral to South Dallas as such.

But we are here asking for a 10-1 plan and asking that South Dallas be maintained as —

THE COURT: Yes, I understand that.

[248] I was getting the idea with regard to these 4, 6, 8, 10 and 9, and then with regard to 6 and 8, I wanted to see how they compared, I mean from your contentions?

MR. PAUKEN: Yes, sir.

MR. JOHNSTON: Your Honor, before Mr. Hernandez starts his examination, we have examined the record and apparently those were, the D.I.S.D. statistics were not admitted into evidence although we prepared an exhibit on them. We can bring that exhibit to the Court Saturday.

THE COURT: Yes, okay.

MR. JOHNSTON: For the Court's information, I believe there are nine single member districts in the D.I.S.D. and there is evidence in the record that the boundaries of the D.I.S.D. are quite similar to that of the City.

THE COURT: In other words you're going to have eighty-five to ninety thousand population in each one of those districts?

MR. JOHNSTON: That would be correct.

THE COURT: Okay. Thee are nine districts.

THE WITNESS: Nine, yes, sir.

THE COURT: And they're rather equal distance, I presume?

MR. JOHNSTON: I presume.

THE COURT: All right. That gives me what I was [249] interested in knowing, that you have a population in the Dallas Independent School District of eighty-five to ninety thousand population, all right.

CROSS EXAMINATION

BY MR. HERNANDEZ:

Q Mr. Medrano, you are familiar with the problems of the Mexican-Americans politically, are you not?

A Socially.

Q And also to the black Americans?

A To my experiences.

Q Are you familiar with the problem that exist between the two communities, the animosity that exist sometimes between the two communities?

A No, I wasn't aware of that.

Q You've never experienced any problems on a black-brown basis?

A No, I haven't.

Q You have personally in your job never experienced any problems on a black-brown basis?

A Personally?

Q Yes, sir.

A Oh, I've received in personal.

Q I take it what you're telling the Court is that there are no animosities between the Mexican-American community [250] and the black American community, say, for example in the West Dallas area?

A To my knowledge.

Q Well you're very familiar with that area?

A I'm giving my testimony to my knowledge.

Q Now you are familiar with the fact that Mexican-American community in the West Dallas area lives in pockets, are you not?

A Oh, yes, most definitely.

Q And these pockets are surrounded or separated from the black community in that area?

A Yes, they are separated.

Q And what's some of the names of the pockets that they live in within this area?

A What, Anglo or Indian, Chinese?

Q No. The Chicanos in West Dallas?

A By census or precincts?

Q By precincts and by common name?

A The better area which is census tract 106, which is about two thousand registered voters. And I think it's Precinct 411, that's a predominantly Mexican-American area.

Q There's not many black Americans that live in that precinct at all?

A Oh, less than one percent.

[251] Q And then what other area? Is there an area —

A Labajara, which is Precinct 417. Approximately twenty-five hundred registered voters there. There's another pocket.

Q Are you talking about this area within District 2 on —

A I would say it's left right of Velvet Street which is half of another precinct.

Q This is on Plaintiffs' Exhibit 111 which is a 10-1 plan that they have it drawn in.

So you have Precinct 411 which is predominantly Chicano?

A Right.

Q Then 413 is predominantly black?

A Yes.

Q And 415 is predominantly black?

A Yes. 464 is black.

Q And 417 you say is predominantly —

A I would say it's fifty-fifty.

A Mexican-Americans?

A Fifty percent.

Q Fifty-fifty, all right.

Now we have the Trinity River that comes right through this.

A You've got two precincts breaking there, 193 and 356.

Q What are they, predominantly —

[252] A Very little registered voters. It's a heavy industrial area. 193 is predominantly black.

Q Once you cross the river, Mr. Medrano, the entire complexion of this district changes, doesn't it?

A Yes. It increases to more Mexican-American and Anglo, less black.

Q Hardly any black in this whole area up here including Love Field in the top part of this —

A With the exception of 168, 169.

Q That's the black populous?

A Right, the black populous.

Q The community interests between what is traditionally West Dallas and this area which is hemmed in by the Dallas-Fort Worth Turnpike —

A Right.

Q — is different than the community interest in the Little Mexico, Oak Lawn area right in here, is that correct?

A As it relates to Mexican-Americans or blacks?

Q To both?

A Well you wouldn't have black problems north of the Trinity.

Q And the Mexican-American problems here are different than the Mexican-American problems —

A No. The same.

Q The exact same problems?

A The same problems.

[253] Q And then once you cross the toll road in this District 2 coming south, then that becomes predominantly white community, does it not?

A Yes, it does.

Q Now those problems, though, are different than the Mexican-American and black problems?

A Yes, they are.

Q Now within that district you also have a housing about a thirty-five hundred unit housing, Dallas Housing Authority project there?

A Thirty-five hundred is correct.

Q Are you familiar with any animosity that exists in that housing project between the black and the brown community?

A Not animosity. It's predominantly black, I would say it's ninety-five percent black, so we have little room for confrontation between browns or blacks.

Q Is there any confrontation between browns and blacks in that housing authority?

A Not to my knowledge.

Q Well you've worked that area, have you not?

A Yes.

Q As a member of the DCCAC?

A Yes.

Q Now I was a little confused about your testimony in the sense that you said that you received black support, white [254] support and brown support in order to win in the single member

district but you didn't form any kind of coalition or anything.

A I did not.

Q What do you consider to be a coalition?

A It's when you pledge some — or subject to some type of loyalty in order for return for something else.

Q Well did you pledge to the black supporters that you had that you would represent them and try to do a good job for them?

A Did I pledge to them?

Q Yes.

A No, I did not.

Q Did you pledge to the whites that you supported that you —

A No.

Q — that you would try to do a good job for them —

A No.

Q — in representing their interest?

A No. Not in the sense of pledge. I get a different meaning of pledging.

Q You didn't have to sign a promissory note or anything, —

A That's right.

Q — but you did tell them that you would look out for their interest?

A Yes.

Q And you expected them to work for you and you would work for their interest?

A Yes, that type —

Q You were trying to put together a group of people, were you not, to get yourself elected?

A Not a group of people.

Q Now under the 8-3 plan as the City of Dallas as the Defendant has put into evidence here, is there any possibility of a Chicano getting elected under that plan in your opinion?

A Other than at large.

Q Based on your experience and your knowledge of the Citizens Charter Association, would they be likely to endorse a Chicano in the at large condition under the 8-3 plan?

A I don't understand your question.

Q Do you have an opinion as to whether the CCA would endorse a Chicano under the 8-3 plan at large?

MR. BICKLEY: If it please the Court, I think we object to this particular question because this man said he never did seek their endorsement, he doesn't know whether they can endorse or can't endorse because he hasn't tried. And he doesn't want their endorsement.

THE COURT: Well this is also speculative as to whether they endorse or not endorse. Some want it, some [256] don't. You just don't see much —

MR. BICKLEY: A halo or a millstone, Your Honor, but we object to the question.

THE COURT: Well if he has an opinion. It goes to the weight.

THE WITNESS: I have an opinion.

Q (Mr. Hernandez) Yes?

A I've been watching the City politics and watching how Mr. Weber and Ms. Harrison falls now, and they're subject now to the single member district, they will have a better chance at the at large system, they will probably cast out Mr. Aguirre this time, the CCA might cast him out and he will be subject to retaliation on the part of the CCA in case Mrs. Harrison decides to run at

large, and of course we know where the mayor is at, so we've got two at large positions. And that's like I say, speculation, if Mrs. Harrison decides to run at the at large system, then that would leave Mr. Aguirre out.

Q No way under the single member district portion of that plan that the Chicano can win?

A There's no way. I said if the 8-3 is adopted, there's no way that a Mexican-American can be elected under single member district.

Q You've had some experience in the City elections, have [257] you not?

A City elections, yes.

Q You worked in the campaign at the time that Mrs. Martinez was endorsed by the CCA?

A Yes, yes.

Q I believe you worked in the candidates campaign against her?

A Yes, I did.

Q Do you know of any Chicano that's ever been elected to the City Council without the CCA endorsement?

A No. There's only been two.

Q And do you know of any Chicanos who have run for the City Council without the CCA endorsement and been successful?

A No.

Q There have been some Chicanos who have run every election for about the past three elections, have there not?

A Yes; including yourself.

Q Now you recall back in 1968 that the City Council was made up of nine members and there was some concern by the City

Council to add and put into the City Council a member of the black community.

Do you recall that the City Council made a Charter Amendment, had a Charter election and expanded the Council from nine to eleven to accommodate the black community?

A Very familiar with the Charter.

[258] Q And in fact the Chicano community at that time worked against that Charter amendment at that time, as you recall?

A I don't recall.

Q Do you recall Johnny Caloomna and that group of young Chicanos trying to defeat the Charter amendment?

A Yes, sir.

Q But that Charter Amendment passed and as a result I believe Councilman Allen was put on the City Council?

A That's true.

Q During that time are you familiar with an organizaiton known as PASO?

A Yes.

Q Do you recall specifically the representative of PASO going before the City Council and proposing a plan to the City Council to implement in terms of districts for the City of Dallas?

A Yes. Single member district concept, yes.

Q Sir?

A Single member district concept, where PASO went before the City Council?

Q Yes.

A Yes, I'm very familiar with it.

Q Are you familiar with the fact that there may have been

was that a combination plan or a straight single member district plan?

[259] A It was straight single member district plan.

Q Now in terms of — you have particularly come from a political family, I think, wouldn't that be a good description?

A No, none of our family has ever run for political life — political positions.

Q You wouldn't consider your father to be well-known across this state and this country politically?

A Yes, I do.

Q He's been primarily a union organizer in political circles, particularly in Chicano circles for a long time?

A Yes, I do.

Q He's well-known and well-recognized?

A Yes.

Q And he's worked very hard and long in all elections on behalf of Chicanos within the City of Dallas for the past fifteen, twenty years?

A State, local and national.

Q State, local and national?

A Right.

Q And you have learned from him a lot of your political knowledge in working with the City elections and the various other elections?

A Yes, I did.

Q Do you think Mr. Medrano that because of your father's [260] long work and because of your work, that this gives you an edge in the sense that your name has some identification, that a Chicano who has not done this and attempted to get elected from,

say, District 2 on the 10-1 plan, might not be able to get elected?

A Name factor has a lot to do with it.

Q Now you heard — did you hear Dr. Weiser testify about the fact that there may be a little higher standards for Chicano candidates for political office in the terms that they might have to be better qualified or better known in order to win, do you agree with that?

A Better qualified?

Q Yes.

A No. As long as he can be responsive to the people's needs and to relate, I think that's the key to everything.

Q Do you agree or disagree with the fact that in order to be elected out of District 2, you might have to be a Super Mex?

A No. I disagree.

Q Your father in his activities and you in your activities, someone asked this question in terms of most of the organization that has been done has been done in the field of union organizing.

Do you feel that this has given you or gives you a particular advantage since there's been a lot of union [261] organizing in that area?

A There's little or no union activities in the District 2 area, because of the composition of the area, little or no industrial areas.

It's heavily single member dwellings and apartment complexes. There's little or nc union organizing done in the complex.

Q Have you done union organizing for other purposes using union funds, voter registration drives, this sort of thing?

A No, I haven't.

Q Has your father done that?

A My father has.

Q Have you helped him in that?

A In what area, District 2?

Q Generally doing that organizing?

A State, local, national?

Q Local.

A Yeah, there's been some heavy registration drive, voter drives throughout the Dallas County.

Q Now you of course know Dr. Dan Weiser quite well, do you not?

A No, I don't.

Q You don't know him very well?

A No, I don't.

Q Have you ever talked with him about him cutting this
[262] district to your advantage?

A No, definitely not.

Q This is not the first time that you've seen this district, is it not?

A No. The first time was Sunday.

Q Have you talked with Pat Holdaway about this district?

A No. Just met her yesterday for the first time.

MR. HERNANDEZ: That's all the questions I have.

MR. JOHNSTON: I have nothing further, Your Honor.

THE COURT: Let me ask you.

(The following questions were propounded to the witness by the Court:)

Q Do you know how many registered Mexican-American votes in the City limits of Dallas, approximately?

A No, I don't, but I could find out real easy. Depends on what you're after. You're after a School Board, then I purchased all the registered voters precinct lists and you've got your Spanish surname so you can find out real quick.

Q I figured that someone had figured that out.

A I did my homework when I ran for the School Board election, that type stuff. But to remember those figures and —

Q Do you have that figure for your '72 and '73 —

[263] A Yes, yes, I do.

Q Could you get that for the —

A I'm sure anyone can get it. They cost a dollar apiece.

Q I mean, if you had it? I just want to know what the total figure is?

A Registered voters?

MR. HERNANDEZ: Registered Mexican-American voters?

THE COURT: Yes.

MR. HERNANDEZ: It's probably in the neighborhood of fifteen thousand, Your Honor.

THE WITNESS: I can get that information.

THE COURT: I understood you've already got it.

MS. DEMAREST: He has it I think for his area, Your Honor, not for the City.

Q (By the Court) I understood you had it when you ran for '72 and '73 at large?

A No, not at large. The '74 single member district, I had it.

Q All right. I was trying to find out what it was for the entirety.

A That information is available at the County Clerk's office, I'm sure.

THE COURT: All right. I have no further questions.

MR. JOHNSTON: We have nothing further, Judge.

TRANSCRIPT OF PROCEEDINGS

Volume XI

[6 l. 7] LOIS BACON, having been duly cautioned and sworn, testified as follows, to wit:

* * *

[24 l. 8] BY MR. HERNANDEZ:

Q Miss Bacon, I take it by your testimony that this eight, three plan as revised this morning is basically the same plan that the city proposed at the outset of the remedy portion of this case?

A Yes, sir.

Q Now, there is no district that the Mexican-American has a specific percentage of populations in the single member districts if we use the percentage of 56 percent of the population is safe, is there?

A There is no district that has 56.

Q The highest percentage is 20 percent. So would you be of the opinion, then, that in the single member districts that the only way that the Mexican-American — well, the Mexican-American has no safe district that he can win in an election?

A If he were totally dependent upon Mexican-American votes, certainly not.

* * *

[25 l. 20] J. B. JACKSON, having been duly cautioned and sworn, testified as follows, to wit:

* * *

[35 l. 12] BY MR. HERNANDEZ:

Q Mr. Jackson, under the revised plan that the city has put

into evidence this morning, tht doesn't change the position of the Chicano in getting himself elected at-large, does it?

A That is true.

Q And the only way that Mexican-Americans could be elected at-large under the eight, three plan would be with the support of the dominant white slating group generally known as the CCA?

A It's true the Mexican-American would be in the same compromising position as the blacks.

* * *

[37 l. 10] Q The other thing, is it a fair statement to say that the black members on the council generally concern themselves with representing black interest?

A Yes. Yes.

* * *

[42 l. 15] ALBERT L. LIPSCOMB, having been duly cautioned and sworn, testified as follows, to wit:

* * *

[53 l. 7] Q Now under the 8-3 Plan as offered by the City, do you have an opinion as to whether or not a Mexican-American can win an at-large seat?

A Possibly, if he's a multimillionaire, he has been anointed by the CCA, that's a possibility, or extremely wealthy. I'm not trying to be snide, but extremely wealthy or anointed by the CCA. I think we all know that. We're all adults. We know that.

* * *

[54 l. 23] Q (By Mr. Hernandez) Let me ask you about the Little Mexico area where the City came in and put a new toll road.

[55] A Right.

Q Those people were relocated?

A You're correct.

Q Those were all Mexican-Americans?

A That's correct. They sure did. The same thing happened to the blacks at Love Field, Fair Park and all. I can go on and on, you know. Right.

* * *

[l. 18] Q Let me ask you this: Have Mexican-Americans in Dallas generally been treated in the same manner and in the same fashion as the black American, has he not?

A That's correct, sir. I think he's beginning to realize that himself. You know, it used to be white on the driver's license. He was completely faked out of position.

Q And the Mexican-American has suffered all the [56] discriminatory acts and —

A Right.

Q — and been deprived just as the Black American has in Dallas?

A I would think so.

Q And that's true politically as well as economically and in other facets of life?

A He did so, that's right.

* * *

[83 l. 7] THE COURT: I'm sure that all of you recognize that being a Judge is a real easy job to have. Really not many problems, not many decisions to make.

* * *

[86 l. 16] At the same time, this Court will — I'm going to enter a final order — I mean a judgment and opinion, it's going to take me several days yet to get the opinion finally prepared.

But at the same time I am retaining jurisdiction of this case to oversee any ramifications of this over the next several months or however long a period is necessary.

* * *

[94 l. 2] So if we move all the way — and, of course — and it's not even before this Court about increasing over eleven councilmen because here again that gets back to the people of Dallas and the City Council. There are eleven councilmen authorized under the present City Government of Dallas.

There is, of course, as counsel for the Mexican-Americans indicated, if you could go up to about twenty councilmen then there would be some Mexican-American districts that would have at least a mathematical possibility of being elected in single member districts.

* * *

[101 l. 14] And there's another reason why I'm keeping some jurisdiction on it, I want to see how it's going to work. And this City Council may come in after this election and say, "We want to change these lines, we want to add a district," or "We want to this or that."

* * *

Albert L. Lipscomb, et al.
v.
The Honorable Wes Wise, Mayor of the
City of Dallas, et al.
Civ. A. No. CA-3-4571-E
United States District Court,
N. D. Texas,
Dallas, Division
March 25, 1975.

MEMORANDUM OPINION

MAHON, District Judge.

This challenge to the present electoral system for the Dallas City Council has progressed a winding path to trial. Filed in 1971, the suit was originally dismissed for failure to state a claim upon which relief could be granted. On appeal, the Fifth Circuit remanded with clarification of what plaintiffs' burden would be in these circumstances. *Lipscomb v. Jonsson,* 459 F.2d 335 (5th Cir. 1972).

I.

Plaintiffs originally purported to represent the black population residing within an identifiable area of the City of Dallas, but prior to December 9, 1974, no order certifying this cause as a class action was entered. The Court originally began to hear testimony on this matter during the week of July 15, 1974. After approximately one and a half days of testimony, the Court, on its own motion, and out of an abundance of caution, suspended testimony pending resolution of the possibility that the matter might have been one of state-wide rather than local concern, and therefore appropriate for a three-judge court determination. The case was determined to be one appropriate for a single judge to hear, and the cause was reset for hearing for the

week of December 9, 1974.[1] On the day of the trial, the Court entered an order, certifying the matter as a class action; the class consisting of all blacks residing within the corporate limits of the City of Dallas. The order also denied a pending motion for leave to intervene on behalf of certain Mexican-Americans as parties plaintiff. This denial was the specific right of the proposed intervenors to participate in any subsequent hearing that may be held concerning the manner of appropriate relief if the present election system was held to be constitutionally defective. The order provided in part that:

> "It appeared that on the initial filing of this lawsuit on the 10th day of March, 1971, there were included as plaintiffs members of the Mexican-American Class and the action was on behalf of all the minority groups including the Blacks and Mexican-Americans who live within the City of Dallas. The defendants sought to elicit written interrogatories from all of the plaintiffs. Certain of the plaintiffs refused to respond to the interrogatories and upon contact by their counsel continued to refuse to respond. Included in this group were all of the Mexican-American Race originally included as plaintiffs in the lawsuit.
>
> Upon motion duly made and hearing had, the Court dismissed from the lawsuit all of those members of the plaintiff's class who refused to respond to written interrogatories. Included within this group were all those of Mexican-American descent.
>
> Prior to the entry of this Order the plaintiffs had amended their pleadings by their Second Amended Original Complaint and included in the Amended Complaint were both the Black and Brown citizens of Dallas. However, counsel determined that after all of the Mexican-American

[1] Tex. Const. Art. VI, § 3, Vernon's Ann. St., in essence provides that all qualified electors within a city shall have the right to vote for all elective officers of a city. *See also,* Tex. Const. Art. VI, § 3, and Vernon's Tex.Rev. Civ.Stat.Ann. art. 1175(1963). *See however, State v. McAllister,* 88 Tex. 284, 31 S.W. 187, 189 (1895), which holds Tex. Const. Art. VI § 3 not to be a bar to the election of city aldermen by wards. On July 11, 1974, Chief Judge Brown of the Fifth Circuit advised the Court that he had declined to constitute a three-judge court in this cause.

> plaintiffs were dismissed, and having no individual Mexican-American plaintiffs, that they could no longer represent the Mexican-Americans as a class and therefore urged the Court to consider this an action with the class being those Black citizens residing within the city limits of the City of Dallas.
>
> After a portion of the case had been presented to the Court and the trial had been commenced and recessed, the intervenors filed their motion on July 16, 1974, for the purpose of intervening on behalf of the Mexican-American citizens in the City of Dallas. The testimony previously presented to this Court shows that this class represents approximately 8% of the population of the City of Dallas, the housing pattern is such that they are spread throughout the city limits of Dallas and are not a predominant factor in any concentrated census tract groups, and in view of these facts, the Court is of the opinion that to allow the intervention at this time would result in many difficulties in the management of this case as a class action and it would result in a delay that would possibly take the case beyond the time of the City Council election and the time that candidates need to file their candidacy. Moreover, the Court is of the opinion that to permit this intervention at this late hour would not assist the Court in resolving the issue of the constitutionality of the present at-large system."

After this order was entered, testimony was resumed on the question of whether the existing manner of electing members of the Dallas City Council was constitutional. On January 17, 1975, the Court found the present system of electing members to the Dallas City Council constitutionally infirm. Dallas was afforded an opportunity to come forward with an apportionment plan which would meet constitutional standards and testimony was heard on the merits of the city's proposal the week of February 4, 1975. Testimony at the remedy stage took over two days.

II.

This suit is not the conventional one person, one vote reapportionment case; rather it is an attack alleging dilution of

the racial minority vote. The dilution is said to arise from operation of the at-large system of electing Dallas City Council which provides that every candidate for council run city wide, and face all the voters of the city. The Dallas City Charter requires that the city be divided into eight residential districts for City Council elections. Any person seeking election for any of the "places" on the ballot corresponding to the eight districts, must reside in the respective district. Three members, including the mayor, run without regard to any residence requirement. Voting for all eleven council seats is at-large, that is, on a city wide basis, regardless of the residency requirement. A majority of all votes cast for the councilmen, for the place for which the person is running, is required for election.

Dallas adopted its present council/manager form of government in 1931. Prior to that time it had a commission form of government, but since at least 1907, members of the city government have been elected on an at-large basis.

The number of positions on the City Council has been enlarged from time to time, the latest change being in 1968 when, by charter amendment it was increased from nine to the present eleven seats. The City Council elects from among its members two councilmen to hold the positions of Mayor Pro-Tem, and Deputy Mayor Pro-Tem. As noted above, all positions to council are elected by vote of the entire city.

The alleged dilution of the black citizens' vote was said to have its genesis in the racially segregated housing pattern present in the City of Dallas. Plaintiffs' uncontradicted evidence showed the existence of what was variously called a minority or inner city area. The characteristics of this geographical area were developed by use of United States Census demographic data and the area was described as being more or less contiguous, extending from the city's South side, north to the city's central business district, curving northwest across the business district to the city's Love Field area. Within this area are located some

forty-odd standard statistical community census tracts as defined by the United States Census Bureau. Plaintiffs' experts gave testimony concerning the racial and socio-economic composition of the minority area and offered exhibits in summary. The black population of Dallas is 210,227.[2] The evidence shows that the minority area contains a black population which is 90% of all residents in the area. This means that nine out of every ten residents are black; of all the black residents in the city of Dallas, 93% reside within this area; of all the black residents of Dallas County, 95% were shown to reside here. In addition to the distinct racial composition of the inner city area, other characteristics were shown. A less desirable rating on many economic indicators of well-being were shown to exist here. For example, housing was shown to be generally of less value and of lower quality in the inner city area. The median grade level of schooling attained by residents of this area was shown to be less than for the non-minority areas. Unemployment was higher. Median income was lower. In general socio-economic indicators purporting to show "quality of life" were less favorable when compared with other areas of Dallas.

The voting patterns of the inner city area in relation to the voting patterns of the rest of the city with regard to elections for City Council positions were examined. The testimony was concerned with who carried the black area and how that candidate fared in the city elections at large. Examples from five elections demonstrate the pattern which emerged from this testimony. The first two elections concern place three for the subsequent election years of 1959 and 1961. The 1959 election presented a black vs. white contest. The black candidate in that election polled some 87% of the votes from the above-described inner city. His white opponent polled some 73% of the vote from the non-minority area. The result, when translated into vote totals, gave the white candidate a 65% total of all votes cast

[2] United States Census Data, 1970. Unless otherwise stated 1970 census data is used for all population and percentage figures.

and made him the election winner. The 1961 election pitted a black against two white opponents. Here, the black candidte played the role of spoiler, forcing a run-off between his two white opponents. In the first election, the black candidate garnered 81% of the black area's votes. In the white area he gathered a scant 15%. The relative percentages left him as low man in the three-way race and eliminated him from the run-off. In 1965, the place eight election is illustrative of the pattern. This was a two-way race, black versus white. The black candidate carried the black area with 86% of the vote; the white candidate carried the white area with 75% of the vote. The total vote percentage gave the white candidate 62% making him the winner of the election. In 1969, the place ten race was three-way involving one black against two whites. The black carried the black area with 42%. The two whites (together) pulled about 83% of the white area's vote. No run-off was necessary however because here one of the whites received 59% of the total votes within the city. The 1971 election showed a corollary situation for place ten. Here, two black candidates ran against a single white candidate. Together the black candidates received 60% of the black area vote. The white candidate received 68% of the vote from the white areas, which was 63% of the city wide total. This, of course, made him the winner without the necessity of a run-off.[3] The Court feels that it is this voting pattern which is the key factor to understanding the dilution present in Dallas.

A description of Dallas political life would be incomplete without reference to the non-partisan slating groups. Like so

[3] The Court also notes that participation by the black community in the political processes of the city has generally improved in the past few years. In other areas, particularly, responsiveness of Dallas to minority concerns, improvement has been spectacular during this same period. The Court believes however that post litigation changes in these regards are similar to the argument that the electoral success of blacks forecloses dilution attacks. This contention has been specifically rejected as to any bearing on dilution itself. *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc). In evaluating the new plan which the city has presented, however, this improvement is of significance.

many large cities, partisan politics in the "party" sense of the word does not exist. The Republican and Democratic Parties simply do not field candidates. Instead, the politics surrounding Dallas City Council elections turn on the influence of slating groups. The slating group which has enjoyed dominance in the sense that it has been extremely successful in getting its candidates elected is the Citizens Charter Association (hereinafter C.C.A.) The C.C.A. has as its express goal the maintenance of good municipal government, specifically as embodied in the council/manager form. Testimony by one active participant in the affairs of C.C.A., an ex-president, gave insight into its functioning.[4]

C.C.A. has enjoyed considerable success with its candidates. Testimony shows that in the eight elections held since 1959, C.C.A. endorsed candidates have won in 82% of the races involved. This history shows that of seventy-five C.C.A. endorsed candidates , sixty-four triumphed at the polls. This is an 85% success rate.

The record affirmatively shows that since 1907 only two blacks have been elected to the Dallas City government. The first black to be elected was the present Mayor ProTem, Mr. George Allen. Mr. Allen testified for the plaintiffs in the first stage of the trial and for the City at the remedy stage. His testimony is that he was first elected to City Council in 1969, but only with C.C.A. support. This support was said to have been the result of a campaign bargain in the 1967 election to the effect that the black support for C.C.A. endorsed candidates would be linked to support for a Charter Amendment increasing the size of City Council from nine to eleven and that one of the two new seats

[4] Uncontradicted testimony shows that CCA is an election year phenomenon and is only concerned with Dallas council elections. During off election years the association has no permanent governing body or officer except the president. With the approach of a council election, the president initiates activity by naming various election committees which in turn hold meetings and select candidates. Historically, CCA grew out of a reform movement in the 1930's which was aimed at correcting abuses of the old commission form of government by infusing citizen participation into government affairs.

would go to a black person. This bargain was apparently kept by all parties. The Charter Amendment was passed, the size of the City Council was increased, and Mr. Allen was supported for a position by C.C.A. and won in 1970 with 71% of the vote. His opponent in that election was also a member of the black race. The other black person to be elected to City Council was also endorsed by C.C.A. Mrs. Lucy Patterson ran in an all black contest for place eight in 1973. She had a plurality in the general election and went on to win in the run-off with 53% of the vote total.[5]

The above-mentioned facets of the Dallas redistricting question must be viewed in an historical context. Dallas, located in the state of Texas, inherited by default some of this state's history of official race segregation. There is evidence, however, that Dallas also participated in this history of discrimination. However unpleasant it is to face that history, it cannot be avoided. Dallas' participation in that history is before the Court in large measure by stipulation of the parties. A review of those stipulations shows among other matters the following:

a. The original charter for the City of Dallas written in 1907 contained a section called "Segregation of the Races." This section was amended through 1952 and was carried forward as part of the charter until it was repealed in 1968. This section authorized the City Council to pass city ordinances providing the use of distinct blocks, for the housing, for amusement, for churches, for schools, by members of the "white" and "colored" races.

b. In 1937 the City Council passed an ordinance regarding separate spaces in commercial motor vehicles for white and black

[5] The racial composition of the present city council is two blacks (one male and one female); one Mexican-American (male) and eight whites (one of whom is female). The Court notes this composition as being more indication that circumstances have changed for the better since the institution of this lawsuit and while of not the quantity to overcome the Court's finding of dilution, these changes are again of consequence in considering the proper remedy in this matter. *See* note 2, *supra*.

passengers. A penalty was established for those who rode in spaces not designated for the race of the individual involved.

c. In 1942 the City Council adopted a resolution which enumerated the requirements which a taxi cab owner must have met before the cab would be permitted to carry Negro passengers.

d. In 1961 the City Council agreed to contract for the engaging of ambulance service and burial of Negro paupers.

e. In 1973 the City of Dallas City Council recognized by resolution that there is "unequal law enforcement, dual justice and unequal treatment for the different segments of the community and different races." There are other similar ordinances included by stipulation but these four will suffice for example. There was additional testimony from several witnesses concerning this history and the negative impact it made on the black community generally and specifically on the political life of that community.

Two currents make up the equal protection argument swirling around reapportionment cases. The original stream is the one person, one vote concept. This principle of equal protection is offended when some votes carry more weight than others. *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). One person, one vote came to Texas local governments in 1968. *Avery v. Midland County, Texas,* 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968). Dilution is the other more recent current. This concept involves election schemes conceived or operated as devices to further racial discrimination and a corresponding lesser degree of opportunity to participate in the political process. *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971). The Supreme Court in recognizing that multi-member districts inherently apply the one man, one vote concept, stated that circumstances of a particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population. *Whitcomb v. Chavis, supra,* citing *Burns v. Richardson,* 384 U.S. 73, 86 S.Ct. 1286, 16

L.Ed.2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). The Fifth Circuit panel reviewing the initial dismissal of this case on appeal outlines several factors by which plaintiffs could show lack of participation in the political process of the life of Dallas. *Lipscomb v. Jonsson*, 5th Cir., 459 F.2d 335 (1972).[6] Since that appeal, the Supreme Court has given additional guidance to the circumstances which have a bearing on the opportunity to participate. In *Graves v. Barnes*, 343 F.Supp. 704 (W.D. Texas 1972), *aff'd in part sub nom.; White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), Texas legislative reapportionment was under scrutiny. *White* noted that the Supreme Court had entertained claims that multi-member districts were "being used invidiously to cancel out or minimize the voting strength of racial groups . . .[and] to sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *White, supra*, 412 U.S. at 766, 93 S.Ct. 2339, 37 L.Ed.2d at 324. Looking at this standard, the Supreme Court observed several factors upon which the three-judge court had predicated their holding that the existing scheme was invalid. Among these factors was the history of official race discrimination which at times touched the right of Negroes to vote. Other factors included the number of blacks elected under the existing scheme and the correlation between the endorsement of the white dominated slating organizations and electoral success. *White, supra*, at 755, 93 S.Ct. 2332, 37 L.Ed.2d at 324-25.

[6] These factors include a showing that minority residents are frequently ignored in selection of candidates; slating group operation combined with a high correlation between endorsement and election, and the high cost of city-wide campaigning. *Lipscomb v. Jonsson*, 459 F.2d 335, 339 (5th Cir. 1972).

Plaintiffs' ultimate claims in the case *sub judice* reduce to the question of whether or not the electoral scheme for the Dallas City Council operates to minimize or cancel out the voting strength of racial elements of the voting population. This question was considered with regard to a court approved apportionment plan involving a parish school board and police juries, wherein at large elections the juries were provided in a Louisiana parish where the so-called racial minority commanded a majority of the entire parish population. The Fifth Circuit stated that the proper measure for measuring dilution of minority voting strength is not population but rather access to the political process. *Zimmer v. McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc). The Court reviewed the Supreme Court decisions dealing with dilution or restriction to access and highlighted the various factors which could contribute to the showing of the fact of dilution. Included among these factors are:

1. lack of awareness to the process of slating candidates;

2. the unresponsiveness of legislators to particular minority concerns;

3. a tenuous governmental policy underlying the preference for at-large districting.

4. the existence of past discrimination in general which would preclude effective participation in the election system. *Zimmer v. McKeithen, supra*, at 1305.

Two recent cases by the Fifth Circuit illustrate some ramifications of dilution. In *Robinson v. Commissioner's Court, Anderson County*, 505 F.2d 674 (5th Cir. 1974), a panel of the Fifth Circuit considered dilution in the content of manipulation of district boundaries, i.e., gerrymandering. There reapportionment of the County Commissioner's Court was considered for a Texas county wherein whites comprised approximately 75% of the population and blacks 25%. The major city in Anderson County is Palestine. The city's racial composition was 74%

white and 26% black. The greatest concentration of blacks within the county was within one section of Palestine and 83% of the population of this section was black. In this section of Palestine approximately 26% of Anderson County's total black population resided. Anderson County is, as are all Texas counties, divided into four precincts for the purposes of electing county commissioners. The redistricting scheme under scrutiny in Anderson County was drawn in 1969. It divided the black section of Palestine, Texas, into three separate precincts. In other words, the black community was segmented and divided for the purpose of electing County Commissioners. The panel upheld a district court finding of dilution. It was fragmentation of what was otherwise a "cohesive voting community" that was crucial to the finding of dilution. *Robinson v. Commissioner's Court, Anderson County, supra,* at 679.[7] In *Reese v. Dallas County, Alabama,* 505 F.2d 879 (5th Cir. 1974) (en banc), the Fifth Circuit sustained a finding of dilution in an apportionment plan which did not involve race. Here the disparity was between rural and urban segments of the county's population. Dallas County, Alabama, is also divided into four districts for the purpose of electing County Commissioners. The district containing the City of Selma, Alabama, contained approximately half of the total population for the county. The three other districts divided the remainder of the population unevenly. The plan involved at large elections with a resident place requirement. In other words, for each of the four districts, a candidate for that district place on the County Commissioner's Court must reside within the district, although he was voted on at large. All voters of Dallas County, Alabama, vote for all four

[7] The trial court in *Robinson v. Comm'r Court, Anderson County, supra,* apparently found that the dilution present in that case was the result of a purposeful scheme "designed precisely to dilute the black vote . . ." This Court stresses that in the case of the City of Dallas that there has been no evidence of any design or purposeful intent to dilute the vote of any of its minority citizens. Rather, it is in the operation of the exclusive at-large election plan in combination with the existence of a historical pattern of discrimination which supports the finding of dilution.

commissioners and only one of the candidates residing in each district can be elected. With this election scheme, dilution was found with regard to the urban voters of Selma. The Selma voters were "forbidden to elect resident commissioners in proportion to their numbers . . . Unlike residents of Selma the other voters in Dallas County [Alabama] can choose their proportional share of the representative body, from among . . . candidates who can . . . be expected to share their interests." *Reese v. Dallas County, Alabama, supra,* at 883. In other words, the scheme involved a minimizing or cancelling out the voting strength of a group that had an identifiable set of common interests. In *Reese*, the groups with an identifiable set of common interests were divided along rural and urban lines. In the instant case the landmarks of the set of common interest are racial.

From these two cases it can be seen that the fact of dilution can be present in a variety of voting schemes, even when the one person, one vote concept is adhered to. Dilution was found with single-member districts when a concentrated group with common interests was split up diffusing its strength over three districts. *Robinson v. Commissioners Court, Anderson County, supra.* Likewise, in *Reese*, with an at-large scheme, dilution occurred where candidates were required to be residents of unequally populated districts and the districts had obvious distinctions in "identifiable sets of common interests." *Reese v. Dallas County, Alabama.*

Based on these standards, it is clear that the present system of requiring all members of the Dallas City Council to run at-large on a city wide basis involves dilution. In this regard, the Court believes that two factors are of particular significance. These are the existence of past discrimination in general, which precludes effective participation in the electoral system and a customary lesser degree of access to the process of slating candidates than enjoyed by the white community. These factors are crucial when viewed in the historical context of the city and state.[8]

[8] *See,* however, notes 2 and 4, *supra.*

The mere existence of a definable minority area wherein some 90% of all black residents in the city live, the Court believes, is itself a lingering effect of past official race discrimination. There appear to be other lingering effects and these include the lesser degree of opportunity available to black residents to meaningfully participate in the election process in the City of Dallas. This lesser degree of opportunity is best shown by the voting pattern I have found to exist for the city:

> Black voters, that is, those residing in the inner city area, vote for black candidates, giving them at least a plurality, and usually a majority of their votes, and the white community, the non-minority voter tends not to vote for the black candidates.

This is dilution. In other words, when all members of the city council are elected at large, the significance of this pattern of blacks carrying their own areas and yet losing on a city wide basis is that black voters of Dallas do have less opportunity than do the white voters to elect councilmen of their choice. Another shadow of dilution is found in the high correlation between endorsement by the C.C.A. and victory city wide. Meaningful participation in the political process must not be a function of grace, but rather is a matter of right. *Graves v. Barnes,* 343 F.Supp. 704, 726 (W.D. Texa. 1972), *aff'd* in part *sub nom. White v. Regester,* 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed. 314 (1973).

The Fifth Circuit in *Zimmer v. McKeithen, supra,* noted several factors to be considered in establishing dilution. As noted above, one of those factors is responsiveness of legislators to particular minority concerns. Dallas presented much evidence on the city's *present* responsiveness. It is the Court's view that if present responsiveness of the city to the particular interests of the black community (or for that matter the brown or white communities), were the sole issue which determined dilution, then I have little doubt that there would be no finding of invidious discrimination. There has been ample demonstration of the fact that Dallas is acting for the needs of all its citizens —

parks, street services, police and fire protection, transportation, equal employment opportunity, fair housing and community relations. In these areas and more I find the city to be acting in a responsible manner — in a responsive manner. This present responsiveness, however, is not enough to justify the present exclusive at-large voting plan when weighed against the other factors which I have found.

III.

On January 17, 1975, I made preliminary oral findings of dilution which rendered the exclusively at-large system of voting unconstitutional. After being given time to consider its legislative responsibilities, the city offered its plan and plaintiffs in response, offered two proposals which they felt would be an effective remedy for the dilution which the Court had previously found. The Mexican-American intervenors as permitted by the Court's order of December 7, 1974, participated in this hearing and elicited testimony as to the effect that the city's plan and the plaintiffs' two plans would have on the Mexican-American voting population of Dallas. Additionally, evidence was heard on behalf of some dissenting members of plaintiffs' class who supported the general concept of an exclusive single-member district plan, but disagreed with the implementation of this concept as exemplified by plaintiffs' two proposals.

The election scheme presented by Dallas is a combination, single-member district and at large voting plan. It provides for eight single-member districts and three at-large positions including the mayor (hereinafter sometimes called "city's plan" or "eight/three plan"). The eight council persons elected from the respective eight single-member districts must reside within the district they represent and are to be elected by a majority vote of the residents of their district. The three at large seats have no residency requirement and are elected by a majority vote of all votes within the entire city. One of the at-large council seats is designated as mayor. The district boundaries are essentially the

same as the resident district boundaries under the exclusive at-large voting plan.[9] Plaintiffs presented two alternative plans. Their Plan D provides for ten single-member districts and a mayor who would be elected at large. Each council person would reside in and be elected by a majority vote of his respective district. The mayor would have no residency restriction (hereinafter "ten/one plan'). Plaintiffs' alternate plan provides for each of the eleven council members to be elected from a district and would have the mayor selected by the council members themselves from one of their number (hereinafter "eleven/zero plan").

The Court considered each of the three plans presented, with the spirit of the Supreme Court's mandate in *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) in mind. That is, that reapportionment is primarily the responsibility of state legislative bodies and not the federal courts. In the case at bar, an existing method of electing city council was found to be constitutionally defective. That plan was declared invalid and this Court then gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan. I find that it has met that duty in enacting the eight/three plan of electing council members.

The initial question encountered when considering the city's plan is whether or not *any* plan providing for some at-large voting would, under the circumstances of this case, pass constitutional muster. This is especially true when it is features of

[9] The population variance of the eight districts is not in issue here. The district boundaries were redrawn in 1972 partly in response to this litigation. Plaintiffs' original claims included allegations of unproportional districts and population inequality. After the City Council redrew the district lines plaintiffs subsequently abandoned these contentions. The Court finds that there is substantial equality of population among the eight districts presented by the city's plan. Upon its initial presentation to the Court, the city's plan met objection as to the lack of precision in district boundaries. The city subsequently tendered its plan with modifications to meet these objections. See, defendant's exhibit No. 95 showing census tract composition of districts and defendant's exhibit No. 96 showing so-called field note description of boundaries.

the at-large scheme which contributed to the initial finding of dilution. The starting point for such an examination is the observation that while single-member districts are not constitutionally mandated as such, they are definitely the preferred approach. *Chapman v. Meier, supra; Connor v. Johnson*, 402 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). This preference may yield, however, where particular circumstances justify a variation. The particular circumstances which would justify such a variation are twofold. The first situation is where "significant interests would be advanced by the use of multi-member districts and the use of single-member districts would jeopardize constitutional requirements . . ." *Zimmer v. McKeithen*, 485 F.2d 1297, 1308 (5th Cir. 1973) (en banc). The second situation contemplates use of multi-member (or at-large) districts where they "afford minorities a greater opportunity for participating in the political process . . ." *Zimmer, supra*, at 1308. I conclude that the city's plan falls squarely within the second situation suggested by the Fifth Circuit in *Zimmer, supra*, and permeates to a large extent the first area of circumstances described therein. This conclusion is based upon a consideration of the impact that any plan would have on the Mexican-American citizens of Dallas, intervenors in this cause,[10] and the legitimate governmental interest to be served by having a city-wide viewpoint on the City Council. *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975); *Fortson v. Dorsey*, 379 U.S. 433, 437-438, 85 S.Ct. 498, 13 L.Ed2d 401, 404 (1965).

The Mexican-American population of Dallas is ap-

[10] Mexican-American intervenors presented no plan as such, which in their view would alleviate their situation. Generally, they supported the single-member district concept, but testimony clearly showed that in order to have a single-member district plan in Dallas wherein Mexican-American citizens constitute a majority in a single-member district at least twenty districts would be required. Other suggestions included some form of cumulative voting for council seats, concentric districts around the city and non-contiguous council districts. The Court believes that these suggestions are completely void of merit and would do nothing constructive for either the political interest of minorities or the constitutional interests of all citizens of Dallas.

proximately 67,073, representing some eight to ten percent of the total. The 1970 census data reflects the eight percent figure. Testimony by plaintiffs' expert and others indicate that Mexican-American census data tends to be understated for a number of reasons, primarily because of the lack of precision in determining who is a Mexican-American.[11] Undisputed is the fact that the Mexican-American citizens are diffused and spread out through all areas of the city. In their case, geographic assimilation has been in large measure achieved. Within the limits of Dallas there are only four census tracts which have a majority Mexican-American population, that is, over fifty percent. The testimony shows that Mexican-Americans have, however, endured some amount of unofficial race discrimination, which has in the past existed in the State of Texas and the City of Dallas. Plaintiffs' expert testified in essence that Mexican-Americans are restricted in their access to the political process but that the restrictions here are to a lesser degree than that for blacks. Witnesses from the Mexican-American segments of the Dallas population, of course, said that the discrimination suffered by them was just as pernicious as any suffered by the black population. The dissenting plaintiff agreed that the Mexican-Americans have suffered some degree of political discrimination in the city of Dallas. The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution. In the case of the Mexican-American citizens, the restrictions involved are difficult to precisely evaluate because of the diffuse residence pattern of the Mexican-Americans throughout the city and the population totals involved. What is not difficult to ascertain is the fact that Mexican-Americans do have a significant interest in

[11] These are technical matters of census classification. For example, in some instances being a Spanish surnamed citizen is a basic standard; other considerations may be whether or not the person speaks Spanish in the home or whether Spanish is the native language of the person. Apparently, the totals used by the city even include a very small number of citizens who are of Puerto Rican origin.

the subject matter of this litigation and the Court finds that intervenors are an identifiable minority group with the constitutionally protected right not to be invidiously excluded from participation in the political life of Dallas. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314, 325-26 (1973). The restriction of access which is present for the Mexican-Americans is of a similar nature to that this Court has found to exist for the black voters of Dallas, but it differs in at least two aspects. In the case of black voters, one factor in establishing dilution was the operation of white dominated slating groups; for Mexican-American voters, any restriction of access caused by slating group operations in the at-large system would not be alleviated by the institution of exclusive single-member district voting, in and of itself. Additionally, the slating group operations, while in some respects restricting access for Mexican-American citizens, also permit them as a group to operate in a "swing-vote" manner and give them opportunity they might not otherwise have had. On balance, I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting. *Cf., Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109 (5th Cir. 1975). This Court is unwilling to penalize the Mexican-American community for its successful efforts to date in assimilating to the degree they have into aspects of the life of Dallas.[12]

In an exclusive single-member district plan the Mexican-Americans must, because of their lesser numbers, form voting coalitions with either black or white voters; that is, because of their diffuse resident pattern, Mexican-Americans will always be a minority group with either a black or white majority. They are in a double-bind situation. The Court finds that an exclusive single-

[12] Compare this assimilation with the high concentration of black citizens residing in the inner city area. Testimony suggests that single-member district voting tends, in some cases, to amplify segregated housing patterns. It would be indeed ironic if a remedy for dilution of voting strength resulted in a major impediment to minority citizens enjoying their constitutional rights. *See*, page 5, *supra*.

member district plan would do nothing to increase the opportunity for Mexican-American participation in the political life of Dallas and might tend to decrease it. Because of the voting patterns in Dallas, i.e., black voters tending to vote for blacks, white voting for whites, the browns will invariably look to coalitions with either whites or blacks in order to maintain political viability. This is a political fact of life for the Mexican-American voters in the City of Dallas. I find that presently Mexican-Americans have to some degree entered into the policy-making structure of the C.C.A. and other slating groups, and have their votes heard on the highest levels of these organizations as well as within the city government. In other words, the Mexican-Americans have entered to some extent into the political life of Dallas through the present at-large system. At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time however, it is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters, that would be unavailable in an exclusive single-member district voting plan.

Significant interest of both black and Mexican-American segments of the voting population will be advanced when the city's plan is implemented. Eight single-member districts will permit black voters a greater degree of access and participation in the political process of Dallas. Likewise, the eight single-member districts will, in combination with the three at-large positions, enhance the opportunity of the Mexican-American citizens of Dallas, to utilize their voting potential in a significant new way, while not undermining the degree of participation they have enjoyed under the exclusive at large voting plan. Mexican-American citizens will, under the eight/three plan, have a heretofore unavailable flexibility and greater opportunity to participate in the political life of Dallas. *Zimmer v. McKeithen, supra,* 485 F.2d at 1308. Any redistricting plan which did not

consider the interest of the Mexican-American community would be suspect from a constitutional point of view. Here we deal with two separate minority groups, each with a significant interest.[13] This interplay of district minority interest is markedly similar to the "singular combination of unique factors" which justified a multi-member apportionment plan in *Mahan v. Howell,* 410 U.S. 315, 333, 93 S.Ct. 979, 35 L.Ed.2d 320, 335 (1973).[14]

There is another consideration which supports some measure of at-large participation in Dallas municipal government. That is the need for a city-wide view on the part of council. The council has responsibility for policies which affect the city as a whole, as well as those which affect specific geographic and demographic parts. Several members of the present council and the present City Manager presented the view that having some members of the City Council elected on a city-wide basis would be desirable. This desire for some at-large seats was said to be because of the need for a non-sectional viewpoint in resolving matters such as zoning (the Council functions as a zoning appeal board), budgetary considerations (the Dallas City budget is formulated on a city-wide basis) and city planning. Concern was expressed that exclusive sectional or district voices being heard on these matters would be detrimental to the city's interest as a whole. The Court finds that these interests are of significance in considering any remedy which might be advanced. *Chapman v. Meier, supra,* 420 U.S. at 20, 95 S.Ct. 751. That there is some need for a city-wide interest to be maintained in the government of Dallas is admitted by plaintiffs in their presentation of the ten/one plan. Here, as noted before, one council seat, designated as mayor, is elected city-wide. The evidence is controverted on the point of

[13] *Compare Chapman v. Meier, supra,* 420 U.S. at 19, 95 S.CT. 751 where there was no question of any apportionment plan affecting different minority groups differently.

[14] All factions in this lawsuit provided the Court with testimony from black, white and Mexican-American citizens in support of their particular plan(s).

whether or not the mayor of Dallas is merely a ceremonial mayor with essentially council duties. What is undisputed is that the mayor does have the same council duties as any other council member, and to that extent, he may be considered just a councilman. So it appears that it is merely a question of degree as to how much city-wide representation on these legitimate issues is to be present; three as with the city's plan, or one with the plaintiffs' ten/one plan. The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole; e.g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm.[15] *Chapman v. Meier, supra; Fortson v. Dorsey, supra.* Furthermore, as the Supreme Court has recognized, at-large representation may be of benefit to all persons of the area from which the particular legislator is elected. "[S]ince . . . [the] . . . tenure [of the legislator] depends on the county-wide [in our case city-wide] electorate, he must be vigilant to serve the interest of all the people in the county [city], and not merely those people in his home district." *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 501, 13 L.Ed.2d 401, 404 (1965). The case *sub judice* presents just this type of situation wherein at large representation will be of significant benefit because of the particular nature of the city-wide interest to be served.[16]

[15] Budget and services certainly do not stop at district boundaries. Other areas of particular concern for Dallas as a whole include downtown revitalization projects, convention business and airport services.

[16] The Court has found dilution of the black vote. This is not to say however, that black citizens have not, to a certain degree, made the at-large system work for them as have the Mexican-Americans. Within the framework heretofore described, black citizens of Dallas have entered into the political process. What the Court is attempting to avoid is approving any remedy which does not, on balance, enhance constitutional opportunities for all citizens of Dallas. The Court is particularly concerned with the prospect of district sectionalism which usually occurs in an exclusive single-member district plan. The Court is convinced that no matter how many single-member districts are drawn in Dallas, black voters in all probability would never elect more than 25% of city council *so long as the present pattern of voting exists.* With all single-member districts and the present voting pattern, it would be possible for a majority of council to "freeze out" this 25% and for all practical purposes ignore minority interests. Some at-large seats will give all minority voters the capacity to function as a swing vote and have their voice heard. The present responsiveness of city council demonstrates that a politically aware council does not choose to ignore significant groups of voters when its electorate is the entire city. *Fortson v. Dorsey, supra.*

The demographic pattern of the eight districts in the City's plan is:

Council District	Total Population	Population Deviation from Mean Average of 105,551	Percentage of Total Population Black	Mex.-Am.
1	105,559	+.00045	2.08%	7.63%
2	105,529	-.00020	25.90%	20.00%
3	105,759	+.00197	5.96%	7.00%
4	105,676	+.00118	3.63%	3.20%
5	105,433	-.00112	0.26%	10.60%
6	105,604	+.00050	73.60%	7.20%
7	105,353	-.00196	0.40%	5.00%
8	105,448	-.00098	87.30%	3.44%

There was some initial concern by the Court by the relatively high concentration of black voters in District 6 (73.60%) and District 8 (87.30%). This concern was directed to the question of whether this concentration presented cluster dilution.[17] It is relatively easy to find cluster dilution where it can be shown that district lines are drawn with a purpose or intent to racially discriminate. *Wright v. Rockefeller,* 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, 515 (1964); *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960); *Howard v. Adams County Board of Supervisors,* 453 F.2d 455, 457 (5th Cir. 1972.[18] In this case, however, the evidence is clear that racial gerrymandering was not the purpose or intent of the district lines formulated in 1972 and readopted by the city as a result of this litigation.[19] I find that the eight

[17] Compare with fragmentation dilution as presented in *Robinson v. Comm'r Court, Anderson County,* 505 F.2d 674 (5th Cir. 1974).

[18] *See,* note 7, *supra.*

[19] *See,* note 9, *supra.*

districts of the city's plan follow natural and rational boundaries and that no gerrymandering is present. Generally, the boundaries of each district are major thoroughfares, rivers, creeks, or city limits. For example, a significant portion of the boundary between Districts 4 and 5 (two "white" districts) is Northwest Highway (Loop 12). Likewise, a good part of the district line between Districts 5 and 7 (again two white districts) is the G.C.&S.F. Railroad right-of-way. The Trinity River is the district line separating Districts 7 and 8 (a "white" and a "black" district respectively); the river also separates two "black" districts, 6 and 8. Finally, the boundary between Districts 6 and 7 (a "black" and a "white" district) is in large measure, White Rock Creek. The only possible factual situation presented by the evidence which could support a finding of racial intent in drawing district boundaries is the percentages of minority voters contained in each district. In this case I find that although the percentage of black voters contained in Districts 6 and 8 is somewhat high, the concentration in and of itself does not amount to dilution of the black vote.[20] The Supreme Court encountered a similar situation in *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964). Plaintiffs in that case argued for a finding of racial intent in drawing boundaries and attempted to show that it "was impossible to have districts . . . [as presented there] . . .unless they were drawn with regard to race' . . ." *Wright v. Rockefeller, supra*, at 54, 84 S.Ct. at 604, 11 L.Ed. 2d at 514. There were four districts involved in *Wright*. One was 94.9% white. One was 86.3% black and Puerto Rican and two were approximately 72%

[20] It is apparent that different district lines could be drawn under an eight/three plan to achieve different proportions of minority population. In fact, city council considered and rejected an alternative eight/three plan which gave black voters a majority in three districts (one with approximately 66%; one with 62% and one with 61%). There was some testimony on what constitutes a "safe" district, but this Court is not concerned with safe districts, only constitutional ones. *Whitcomb v. Chavis*, 403 U.S. 124, 156-60, 91 S.Ct. 1858, 29 L.Ed.2d 363, 383-85 (1971); *Turner v. McKeithen*, 490 F.2d 191, 197 n. 24 (5th Cir. 1973). This Court sees no impediment to council drawing different distinct boundaries after the next scheduled election and in fact, there may well be under Chapter 4, Section 5 of the Dallas City Charter, an obligation of council to periodically review distinct boundaries.

white. The Court held that the plaintiffs in that case failed to show that the district lines were a product of a "state contrivance to segregate on the basis of race. . . ." *Wright v. Rockefeller, supra*, at 58, 84 S.Ct. at 606. There has been much controverted testimony in the present cause over how best to draw district lines, whether with an eight/three, ten/one, or eleven/zero plan. Dallas presented testimony from citizens of the black and Mexican-American community saying that the city's plan was a plan which would allow minority access to the political process in a meaningful manner. Plaintiffs' witnesses sharply disputed this testimony. The dissenting plaintiff in turn offered evidence tending to show that both of plaintiffs' plans fragmented the vote of South Dallas, an area which had many unique and common concerns for the black community.[21] This testimony led the Court to fully comprehend that "there is no agreement on whether the political interest of a minority group are best maximized by an overwhelming majority in a single district, bare majorities in more than one district or a substantial proportion in a number of districts. . . ." *Turner v. McKeithen*, 490 F.2d 191, 197 n. 24 (5th Cir. 1973). I find that in Dallas, the constitutional as well as the political opportunity of both minority groups affected are best maximized by the city's plan. This Court is not constitutionally required to see that any particular number of "safe" seats are provided for either black, brown or white citizens of Dallas. What is required is an apportionment plan that does not dilute, minimize, or cancel out the voting strength of any group. *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973). Any plan must provide for equal access to the political process for all citizens of Dallas. It is the duty of the city's

[21] Plaintiffs' expert is white and was severely criticized by the members of plaintiffs' class who opposed the ten/one and eleven/zero plans. The implication of the criticism was that plaintiffs' plans had concerns other than plaintiffs' class who opposed the ten/one and eleven/zero plans. The implication of the criticism was that plaintiffs' plans had concerns other than those of the black community or constitutionality in formulating district lines. *See, Robinson v. Comm'nr Court, Anderson County*, 505 F.2d 674 (5th Cir. 1974), for an example of fragmentation of the black vote. The Court finds that the city's plan best preserves the integrity of the area known as South Dallas, which has an identifiable set of common interests.

legislative body to come forward with a plan that will provide this access, and I find that the City of Dallas has met its obligations in coming forth with its eight/three plan.

This Court believes what the Supreme Court has said time and time again in reapportionment cases regarding the responsibility of state legislative bodies to reapportion themselves. "[R]eapportionment is primarily the duty and responsibility of the state through its legislature or other body rather than of a federal court. . . ." *Chapman v. Meier, supra,* [citing *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d. 506 (1964); *Maryland Committee v. Tawes,* 377 U.S. 656, 84 S.Ct. 1429, 12 L.Ed.2d 595 (1964)]. I cannot reemphasize this point too strongly. The Supreme Court in *Chapman v. Meier, supra,* remanded that cause with a high hope that the North Dakota legislature would accept its duty to enact a constitutionally acceptable reapportionment plan. Only then, if the legislature failed in that task, would the responsibility fall to the federal courts.

Testimony shows that the eight/three plan was not a hasty or ill-conceived one. The Dallas City Council has had many redistricting plans before it in the last two or three years. Various citizen groups have had opportunities from time to time to voice their opinions on general types of apportionment plans. The members themselves have offered council several redistricting plans during the past two years. The Court finds that the city's plan was merely one of many which has been before the City Council for some time, and not one which was hastily conceived merely for the purposes of this litigation.

The Court is not unmindful of its role in apportionment cases. Absent particularly pressing circumstances justifying at large voting schemes, I would not hesitate to approve only single-member districts. *Connor v. Johnson, supra.* This would be especially true if there had been no history of at-large voting in Texas and in Dallas. I find, however, that at-large voting,

especially on the municipal level has been an integral part of Texas local governments and that at large voting schemes have their genesis in reasons other than those racially motivated. In other words, this Court is not forcing at-large voting on the citizens of Dallas with its acceptance of the eight/three plan because Dallas has had at large voting since at least 1907.[22] There is a preference for single-member districts in considering for constitutional purposes apportionment plans. However, at-large plans have never been declared constitutionally invalid *per se. Connor v. Johnson,* 502 U.S. 690, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971); *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L. Ed.2d 363 (1971). I, too, decline to hold that a plan which provides for some at large representation is in itself constitutionally defective where it was only certain aspects of the city's exclusively at large plan which rendered it constitutionally impermissible. *Lucas v. Colorado General Assembly,* 377 U.S. 713, 731, 84 S.Ct. 1459, 12 L.Ed.2d 632, 644 n. 21. Those defects are eliminated by the city's eight/three plan. In Dallas, under the factual situation presented here, neither all single-member districts or exclusive at-large voting offers the balance which is necessary so that all citizens may have equal opportunity of access to the political process. Both plans offer advantages to each minority group as well as to the white majority. The eight/three plan allows the benefits of both schemes without the potential for mischief which is present under each exclusive plan.

At the close of testimony on February 8, 1975, I made findings which approved the city's plan as constitutional. Accordingly, I ordered that the eight/three plan as had been offered by the city, be instituted in time for the April 1975 city council elections, and that the election proceed on the scheduled date. Upon request from the City, the Court modified those provisions of the Dallas City Charter which provide that council candidates have pe-

[22] Compare, *Chapman v. Meier, supra,* where the District Court formulated its own plan for the North Dakota legislature and that state had no tradition for multi-member districting.

titions containing signatures from three hundred individuals qualified to vote for the proposed candidate, to allow petitions containing signatures from any three hundred qualified voters residing in the City of Dallas be sufficient for candidacy. This modification for the April 1975 election only.

On February 21, 1975, plaintiffs filed their motion for attorney's fees and costs. This motion was later supported by appropriate affidavit and on February 27, 1975, attorneys for Mexican-American Intervenors filed their motion on this matter. The City of Dallas filed its opposition to these motions on March 14, 1975. The Court has the matter of attorney's fees under advisement and will make its ruling in a supplement to this opinion.

ORDER

The Court has previously declared the City of Dallas' exclusively at-large voting scheme for Dallas City Council constitutionally invalid and approved a combination single-member district, at large voting plan. The combination plan was initially proposed by defendants as members of the Dallas City Council, after the Court afforded them an opportunity to do so. On March 25, 1975, findings of fact and conclusions of law were entered by the Court. That opinion and order is adopted and incorporated for all purposes in this order concerning attorneys' fees and costs. In the March 25, 1975, opinion I kept under advisement the matter of attorneys' fees and costs. Now, having reviewed the entire record in this matter and considering the briefs of the respective parties I conclude that certain costs should be allowed plaintiffs and that an award of attorneys' fees is inappropriate and will not be allowed.

Plaintiffs and Intervenors moved for an award for attorneys' fees and costs initially contending that they were entitled to such an award under two theories.[23] First, because they were vindi-

[23] Intervenors, representing the Mexican-American citizens of Dallas participated only in the remedy phase of this cause after the old exclusively at-large voting plan had been declared invalid. *See*, this Court's Order of March 25, 1975.

cating significant rights for the citizens of Dallas in eliminating an unconstitutional voting scheme, they were acting as private attorneys general and thus entitled to an award. And, second, an award is proper because of the defendants' bad faith in the conduct of this litigation.

The private attorney general theory has of course been recently foreclosed. In *Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court extensively reviewed the conceptual and historical structure for awards of attorneys' fees under the private attorney general theory, and concluded that in the absence of a specific statute, it would be improper for the District Court to award attorneys' fees on this basis. Significantly, the Supreme Court expressly disapproved the authorities sustaining private attorney general awards. These authorities are of course the same ones originally cited by movants in support of their motion.[24] Plaintiffs now strongly advance the alleged bad faith of defendants to support an award of attorneys' fees. There is no doubt but that a finding of bad faith or obdurately obstinant conduct on behalf of defendants would support an award of attorneys' fees. *Sims v. Amos*, 340 F.Supp. 691, 694 (M.N.Ala. 1972) (Three Judge Court) aff'd. *sub nom. Amos v. Sims*, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972). In this case however, I find there is simply no factual basis to justify a finding of bad faith.

This litigation has been complex and protracted. Conduct of defendants and their counsel was at all times exemplary and most helpful to the Court as the case developed over its numerous

[24] *Brandenburger v. Thompson*, 494 F.2d 885, 890-93 (9th Cir. 1974) (concurring opinion) is also of interest. Here, it was observed that the now disapproved of cases, which sustained an attorney's fee award predicated on a private attorney general concept, also had strong elements of bad faith present. In other words, these cases were saying although we don't need to find bad faith to award attorneys fees, we do find it present and thus will justify an award of attorneys fees on both concepts.

contours.[25] Very few of the matters before the Court were simple or easy to unravel. Many legitimate factual and legal issues were properly raised by defendants for consideration. None can be said to have been frivolous or completely without merit. Much of the factual framework developed at the first part of the hearing on the constitutionality of the old exclusively at large voting plan, assisted the Court in the remedy portion of this litigation. Defendants' contentions that the old plan met constitutional standards did not survive plaintiffs' attack. Many of these same contentions, however, supported the Court's later acceptance of the eight/three, mixed plan which was formulated by the City.[26] Failing to prevail does not amount to bad faith. Compare *Doe v. Poelker,* 515 F.2d 541 (1975), wherein the Court noted that the history of that litigation revealed a "wanton, callous disregard for the constitutional rights [of plaintiffs therein] . . . ."

The voting system of Dallas is established by the City Charter which was adopted by a majority vote of the voters of the City. Changes to the voting system necessarily are changes to the Charter and absent a judicial determination of unconstitutionality, such changes can only be effected by a Charter Amendment adopted by the voters.

It is a City Charter provision which was at issue here, not a mere ordinance. A majority vote of the registered voters of the

[25] This is not to detract from the conduct of movants in this suit. It is however, defendants' bona fides which is now at issue.

[26] Council member defendants urged, as did Mexican-American intervenors in the remedy hearing, that any plan consider the needs of each distinct minority in the City. I feel that this attitude alone, negates any finding of bad faith on the part of defendants and tends to show the merits of the City's claim of responsiveness. *See also,* this Court's Order of March 25, 1975, at pages 16 and 22-23. This Court's finding of dilution was predicated largely upon the realities of housing and voting patterns existing within the City when viewed in an historical context. It is difficult to deny the past, and the defendants, I believe, recognized the past and defended on the basis of present responsiveness. While they did not prevail, I cannot say that the defensive positions were insignificant or advanced for dilatory purposes. As I have herein stated, I do not believe that merely losing on the merits necessarily implies bad faith.

City is required to change the Charter. The members of the City Council, cannot, on their own modify the Charter to alter the voting scheme. Council's role is to propose changes to the Charter by proposed amendment which in turn is approved or rejected by the voters of Dallas. In this context, after the initiation of this suit, in 1973, Council did propose a Charter Amendment which would have provided, *inter alia,* for an enlargement of Council and for a mixed, at-large, single member district voting plan. This scheme of enlargement and modification of the voting system was overwhelmingly rejected by both black and white voters. From this factual vantage point, I do not believe that bad faith or obdurately obstinate behavior by defendants has been demonstrated in any way. If defendants had attempted to unilaterally change the voting plan, absent a vote of the people or a ruling from the court with proper jurisdiction that a provision of the Dallas City Charter was constitutionally invalid, they would have been acting unlawfully. Compare, *Sims v. Amos, supra,* and cases cited therein for examples of bad faith. In *Sims,* the Court noted that the history of that litigation was "replete with instances of the Legislature's neglect of and even total disregard for, its constitutional obligation to reapportion . . . ."*Sims v. Amos, supra,* 340 F.Supp. at 693-94. There as in other reapportionment cases the legislative body had the power and the obligation to reapportion. In the instant case, it is apparent that the Dallas City Council could not have lawfully changed the voting scheme on its own. It lacked the authority to do so. Where there exists a duty and the existing power of an entity to reapportion itself and that entity wilfully and repeatedly refuses to do so, as was the case in some legislative redistricting cases, I agree that those circumstances go far to establish bad faith. Where however there is an absence of inherent power to effect such an apportionment, different circumstances are presented. There is absolutely no basis for concluding that defendants have presented their case arbitrarily or capriciously. No racial

motivation or intent has been found. In such circumstances, no bad faith exists.

Advancing serious defenses and litigating contested facts is not bad faith. Defendants were in part unsuccessful in litigating complex issues. When the Court announced its finding of unconstitutionality, defendants were given the opportunity to come forward with a constitutional plan. They promptly submitted their mixed, at large, single member district eight/three plan. I have found that this plan meets constitutional standards. *Chapman v. Meier,* 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed. 2d 766 (1975). I believe that this presentation of a constitutional voting plan by City Council to be one more demonstration of defendants' good faith. *Wallace v. House,* 515 F.2d 619 (5th Cir. 1975) (concurring opinion.)

Plaintiffs, having prevailed in their suit to have the old at large voting scheme declared constitutionally infirm are entitled to their costs as allowed by law. 28 U.S.C. § 1911 et seq. Rule 54(d), Fed.R.Civ.P. The following enumerated costs as shown on plaintiffs' Bill of Cost filed February 21, 1975, will be allowed.

Fees of the Clerk	$ 40.00
Fees of the Marshal	10.12
Fees and Disbursements for Printing	1,106.97
Fees for Witnesses	224.90
Fees for Exemplification and Copies of Papers	104.50
Costs Incident to Taking of Depositions	1,683.38
TOTAL	$3,169.87

The Court feels that the fees requested for plaintiffs' expert witnesses are not properly taxable. *Henkel v. Chicago, St. Paul, M & O. Ry.,* 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386 (1932).

It is so ORDERED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4571-A/E

Albert L. Lipscomb, et al.
vs.
The Honorable Wes Wise, Mayor
of the City of Dallas, et al.

MOTION TO ALTER OR AMEND THE JUDGMENT OF THE COURT

NOW COMES, PLAINTIFFS ALBERT L. LIPSCOMB, ET AL, and moves this Court pursuant to Rule 59e and Rule 60b of the Federal Rules of Civil Procedure to alter or amend the judgment of the Court entered on March 25, 1975. The motion of Plaintiffs filed herein is based on Rule 60b2 in that there is newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b. In addition Plaintiffs file their motion, out of time, pursuant to Rule 52b requesting the Court to amend or make additional findings of fact and to include these additional findings of fact in the amended judgment requested herein. In support of said motions Plaintiffs would show the Court the following:

I.

On April 1, 1975 the City of Dallas conducted its general election to elect ten councilmen and a Mayor. By canvas of the vote entered on April 2, 1975 the canvasing committee of the City of Dallas declared the results of the election. Said results are attached to this motion as Exhibit A. Exhibit A contains a report of the canvasing committee and declaration of results, as well as a precinct by precinct breakdown of voting results in the City of

Dallas. Plaintiffs move the Court pursuant to Rules 60b2 to receive Exhibit A as newly discovered evidence.

II.

As the report of the canvasing committee of the City Council and the precinct itemization of voting returns demonstrates, incumbent councilman Pedro Aguirre was defeated by incumbent Gary Weber by a substantial majority. Councilman Pedro Aguirre received the endorsement and financial support of the Citizens Charter Association in this election. The total vote in this election was 24,919 or 34.94% of the votes for Pedro Aguirre; as opposed to 45,395 votes or 65.05% of the vote for Gary Weber. These voting returns were received in Place 9, one of the two at-large council positions ordered by the Court. Mr. Aguirre is Mexican-American. Incumbent Aguirre was a Mexican-American whose candidacy was intended to be protected by this Court's retention of at-large seats.

III.

In the Memorandum Opinion entered by the Court on March 24, 1975, the Court found that retention of two at-large council seats would allow greater participation in the political process within Dallas for Mexican-American voters than would be available in an exclusively single-member district voting plan (See page 22 of Memorandum Order of the Court). Plaintiffs urge the Court that this finding is not supported by the testimony heard during the week of February 4, 1975 on the City's proposed 8-3, and is clearly not supported by the showing of Councilman Aguirre in the election conducted on April 1, 1975. Plaintiffs therefore request that the Court amend its findings of fact to hold that the retention of at-large features in the remedy ordered by the Court will not allow greater participation on the part of Mexican-Americans in electing City Councilmen in the City of Dallas.

IV.

At the hearing on the City of Dallas' proposal to redistrict pursuant to 8 single-member, 3 at-large districts, the Plaintiffs submitted two examples of redistricting proposals. Plaintiffs Exhibit 108 was a proposal to redistrict the City of Dallas by drawing 10 single-member and one at-large district. Plaintiffs Exhibit 109 was a proposal to redistrict the City of Dallas pursuant to 11 single-member districts and no at-large districts. An example of the voting results of the election of April 1st demonstrates that Councilman, Pedro Aguirre would have achieved significantly greater results under either of the Plaintiffs proposals. For example, under Plaintiffs Exhibit 108 (the 10-1 proposal) Councilman Aguirre would have received 1,666 votes as opposed to 2,267 votes received by Councilman Gary Weber. This equals 42.4% of the vote for Councilman Aguirre as opposed to 57.6% of the vote for Councilman Gary Weber. This means that Councilman Aguirre received a greater percentage of the vote (7.4% greater) in Plaintiffs proposed District 2 contained in Plaintiffs Exhibit 108, than he received City-wide.

V.

Similar results were achieved by an analysis of the precincts contained in the District 2 created by Plaintiffs Exhibit 109. (Plaintiffs Exhibit 109 is the 11-0 proposal). An analysis of the voting results in the precincts contained in District 2 of Plaintiffs Exhibit 109 shows that Councilman Aguirre received 1,435 votes as opposed to Councilman Weber who received 1,902 votes. Therefore, Councilman Aguirre received 43.1% of the vote as opposed to 56.9% of the vote received by Councilman Gary Weber. Councilman Aguirre did substantially better in the District 2 proposals presented by the Plaintiffs than he fared City wide by almost 8% of the vote. This result was achieved without any special efforts than a candidate would normally make within his district when running in a single-member district situation rather than at-large.

WHEREFORE, Plaintiffs respectfully pray that the Court alter or amend its judgment pursuant to Rule 59e for the grounds stated in Rule 60b2 and hold that the retention of at-large features in the remedy ordered by the Court does not provide Mexican-Americans with a greater opportunity to participate in the political process of electing City Councilmen in the City of Dallas. Plaintiffs further pray that the Court order the City of Dallas to come forward with a redistricting proposal that does not contain any at-large features or, in the alternative that the City be instructed to come forward with a proposal that only permits the Mayor to be elected at-large.

Respectfully submitted,

Sylvia M. Demarest

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion To Alter or Amend The Judgment Of The Court was mailed by United States Mail, Postage Prepaid, to Mr. Alex Bickley, City Attorney's Office, Municipal Building, City of Dallas, 75202, and Mr. Frank P. Hernandez, Hernandez, Inc., UCC Tower, Second Floor, Dallas, Texas 75247 and Mr. Thomas N. Pauken, 5112 Willis, Dallas, Texas 75206.

Sylvia M. Demarest

REPORT OF CANVASSING COMMITTEE AND DECLARATION OF RESULTS

April 2, 1975

TO THE HONORABLE MAYOR AND CITY COUNCIL:

WE, Jerry Gilmore, Lucy Patterson and Gary Weber, your Committee of the City Council, heretofore appointed on March 31, 1975, to canvass the returns of the General Election held in the City of Dallas on April 1, 1975, for the purpose of electing eleven (11) Members of the City Council of the City of Dallas, hereby report that we have canvassed the returns of said Election and we submit the following tabulated statement of the votes received by the respective candidates for members of the City Council at said Election, for their respective Places and Numbers for Members of the City Council as said candidates' names appeared on the official ballot, and the total votes cast for each respective candidate voted on at said Election are shown on the tabulated statement of the returns attached hereto as Exhibit "A" and made a part hereof for all purposes.

On the basis of the above tabulations of the results of the Election, it appears that:

ROSE RENFRO received 4,621 votes; CHARLES H. STOREY received 3.792 votes; JOHN R. SPARKS received 403 votes; and ROBERT C. McINTYRE received 443 votes for Member of Council, Place No. 1.

ROBERTO ARREDONDO received 940 votes; WM. F. "BILL" NICOL received 3,219 votes; JAMIE BELLO received 278 votes; and F. "PANCHO" MEDRANO, JR., received 1,085 votes for Member of Council, Place No. 2.

JOHN N. LEEDOM received 10,579 votes for Member of Council, Place No. 3.

NORMAN GRUNSFELD received 5,710 votes; and RICHARD SMITH received 8,906 votes for Member of Council, Place No. 4.

WILLIAM COTHRUM received 7,813 votes; and RUSSELL B. SMITH received 5,905 votes for Member of Council, Place No. 5.

AL LIPSCOMB received 1,240 votes; CLIFTON S. TODD received 169 votes; and GEORGE ALLEN received 2,974 votes for Member of Council, Place No. 6.

MAX B. GOLDBLATT received 3,840 votes; and L. A. MURR received 3,931 votes for Member of Council, Place No. 7.

DAN THOMAS received 505 vots; and LUCY PATTERSON received 4,184 votes for Member of Council, Place No. 8.

GARY WEBER received 46,395 votes; and PEDRO AGUIRRE received 24,919 votes for Member of Council, Place No. 9.

ADLENE HARRISON received 49,470 votes for Member of Council, Place No. 10.

MORRIS H. FUGITT received 1,039 votes; WES WISE received 43,488 votes; EMERSON EMORY received 3,232 votes; JOHN SCHOELLKOPF received 28,699 votes; and MARVIN C. STEAKLEY received 3,241 votes for Member of Council, Place No. 11.

Further, Write-ins show as follows:

For Member of Council, Place No. 2, LOU SOLOMON received one vote.

For Member of Council, Place No. 3, LIBERTARIAN JONES received one vote; HARRISON received one vote; SHIRLEY MILLER received one vote; JOSEPH HERTZ received one vote; ARTHUR RIDDLE received one vote; and BYRON KING received one vote.

For Member of Council, Place No. 9, MICKEY MOUSE received one vote; S. SINGER received two votes; and JESSIE PRICE received one vote.

For Member of Council, Place No. 10, SNOOPY received one vote; JOHN STEMMONS received one vote; LIBERTARIAN JONES received one vote; JOE BLOW received one vote; DANNY GLEN LEWIS received two votes; CHARLES TERRELL received two votes; PETER LESSER received two votes; HAROLD COFFMAN received one vote; RAYBURN HAHN received one vote; and DAVID H. KING received one vote.

For Member of Council, Place No. 11, JAMES DAVID JENSEN received one vote; DAN RUSSELL received two votes; MINNIE MOUSE received one vote; and MRS. LOUISE SMITH received one vote.

The following write-ins designated no Place Number on the City Council: DR. STUART BROWN received one vote; CHARLES TERRELL received one vote; MICKEY received one vote; MICKEY MOUSE received one vote; BILL EASTLAND received one vote; RAYBURN HOHN received one vote; and HENRY JACOBS, JR., received one vote.

JERRY GILMORE

LUCY PATTERSON

GARRY WEBER

Canvassing Committee of the City Council of the City of Dallas, Tx.

RESOLUTION AND ORDER

WHEREAS, the City Council has received the Report of the Canvassing Committee heretofore appointed to canvass the results of the General Election held on April 1, 1975, for the purpose of electing eleven (11) Council Members to serve on the City Council for a period of two (2) years beginning on the first Monday of May, 1975, and the Council after examining the same finds it correct in all respects and it appears therefrom that one candidate for the respective Place Numbers 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11, as Members of Council received a majority of all the votes cast at said election for the respective candidates and places; and that no candidate for Place 1 received a majority of all the votes cast at said election for the respective candidates for said Place Number 1; Now, Therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the canvass and tabulation of votes cast at the General Election for the eleven (11) Members of the City Council held on April 1, 1975, discloses that:

WM. F. "BILL" NICOL received a majority of the votes for, and was elected as, Member of Council, Place No. 2;

JOHN N. LEEDOM received a majority of the votes for, and was elected as, Member of Council, Place No. 3;

RICHARD SMITH received a majority of the votes for, and was elected as, Member of Council, Place No. 4;

WILLIAM COTHRUM received a majority of the votes for, and was elected as, Member of Council, Place No. 5;

GEORGE ALLEN received a majority of the votes for, and was elected as, Member of Council, Place No. 6;

L. A. MURR received a majority of the votes for, and was elected as, Member of Council, Place No. 7;

LUCY PATTERSON received a majority of the votes for, and was elected as, Member of Council, Place No. 8;

GARRY WEBER received a majority of the votes for, and was elected as, Member of Council, Place No. 9;

ADLENE HARRISON received a majority of the votes for, and was elected as, Member of Council, Place No. 10;

WES WISE received a majority of the votes for, and was elected as, Member of Council, Place No. 11;

and that no candidate received a majority of the votes cast at said Election for Member of Council, Place No. 1; and the City Council after having duly examined the Report of the Canvassing Committee finds it to be a true and correct tabulation of the Election results, that the Election held on April 1, 1975, was duly ordered and notice thereof given in accordance with law; that the Election was held in a manner required by law; that only duly qualified resident electors of the City of Dallas voted in the Election; and that returns of the Election have been made by the proper officers.

It is therefore, ORDERED and DECLARED, that WM. F. "BILL" NICOL, JOHN N. LEEDOM, RICHARD SMITH, WILLIAM COTHRUM, GEORGE ALLEN, L. A. MURR, LUCY PATTERSON, GARRY WEBER, ADLENE HARRISON, and WES WISE have been duly elected as Members of Council for Place Numbers 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, respectively, and the City Secretary is directed to issue them Certificates of Election. That WES WISE, by virtue of being elected to Place No. 11, upon taking the oath of office will become the Mayor of the City of Dallas.

That since ROSE RENFROE received 4,621 votes; CHARLES H. STOREY received 3,792 votes; JOHN R. SPARKS received 403 votes; and ROBERT C. McINTYRE

received 443 votes, it appears that no candidate for Place No. 1 received a majority of the votes cast at said Election for that Place,refore, ROSE RENFROE, who received the highest number of votes, and CHARLES H. STOREY, who received the next highest number of votes, are entitled to be candidates at the run-off election for Place No. 1, as provided by the Charter of the City of Dallas and applicable state laws.

SECTION 2. That this Resolution shall take effect immediately from and after its passage in accordance with the provisions of the Charter of the City of Dallas and it is accordingly so resolved.

APPROVED AS TO FORM:

N. ALEX BICKLEY, City Attorney

By Analeslie Muncy

Assistant City Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-4571-E

Albert L. Lipscomb, Et Al.

vs.

Mayor Wes Wise, Et Al.

MOTION FOR FURTHER RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Intervenors, and moves the Court for further relief and would show the Court as follows:

I.

On February 8, 1975, this Honorable Court issued an oral Order approving the eight-three (8-3) combination Single Member District-At Large plan proposed by the City of Dallas. The Court further noted that it was going to keep continuing jurisdiction in this matter and expressed great concern about the position the Mexican-Americans were being placed in by the 8-3 plan.

II.

Intervenors would show the Court that on April 1, 1975, an election was held in the City of Dallas for the election of Dallas City Councilmen in which the lone Mexican-American At Large candidate was defeated, and that the actions in the electoral process, and the results thereof, should be brought to the attention of the Court. Intervenors would show the Court that under the approved 8-3 plan Mexican-Americans are restricted in their access from entering into the political life of Dallas. It is clear that At Large voting does not offer features which allow

greater participation in the political process within Dallas for Mexican-American voters, but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningfully in the election process.

III.

Intervenors would show the Court that the results of the election of April 1, 1975, and other additional evidence will establish Mexican-Americans are being denied representation and do suffer from the present dilution of their voting strength and do not benefit to a significant extent from At Large voting.

WHEREFORE, PREMISES CONSIDERED, Intervenors move the Court to set this Motion For Further Relief for a hearing and that at said time Intervenors be allowed to present additional testimony as pertains to the 8-3 plan heretofore approved by the Court, and for such other relief as may be equitable in the circumstances.

Respectfully submitted,

HERNANDEZ, INC.
UCC Tower, Second Floor
Dallas, Texas 75247
(214) 630-3683

By: /s/ Frank P. Hernandez
Frank P. Hernandez
Attorney for Intervenors

CERTIFICATION

The undersigned certifies that a true and correct copy of the foregoing was mailed on the ____ day of April, 1975, by United States Mail, postage prepaid, to the parties listed below:

Mr. Alex Bickley
City Attorneys Office
Municipal Building
City of Dallas
Dallas, Texas 75202

Ms. Sylvia M. Demarest
Executive Director
Dallas Legal Services Foundation, Inc.
912 Commerce Street, Suite 200
Dallas, Texas 75202

Mr. Edward B. Cloutman, III
Mullinax, Wells, Mauzy & Baab, Inc.
Dallas, Texas 75247

James A. Johnston
Johnston & Dixon
Dallas, Texas 75202

Mr. Thomas W. Pauken
5112 Willis
Dallas, Texas 75206

/s/ Frank P. Hernandez

Frank P. Hernandez

United States Court of Appeals
For the Fifth Circuit
October Term, 1976
No. 75-2605
D.C. Docket No. CA-3-4571-E

ALBERT L. LIPSCOMB, ET AL.,
Plaintiffs-Appellants
Appellees,

versus

THE HONORABLE WES WISE, Mayor of the City of Dallas,ET AL., ETC.,
Defendants-Appellees,

versus

ADELFA B. CALLEJO, ET AL.,
Intervenors-Appellants.

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiffs-appellants appellees and intervenors-appellants, the costs on appeal to be taxed by the Clerk of this Court.

May 9, 1977

Issued as Mandate: August 8, 1977

Albert L. Lipscomb et al., Plaintiffs-Appellants Appellees,
v.
The Honorable Wes Wise, Mayor of the
City of Dallas, et al., etc.
Defendants-Appellees,
v.
Adelfa B. Callejo, et al.,
Intervenors-Appellants.
No. 75-2605.
United States Court of Appeals,
Fifth Circuit.
May 9, 1977.

As Modified on Denial of Rehearing
July 13, 1977.

Appeal from the United States District Court for the Northern District of Texas.

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

TUTTLE, Circuit Judge:

In *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the Supreme Court held that the constitutional validity of legislative apportionment schemes was a justiciable question because "[j]udicial standards under the Equal Protection Clause are well developed and familiar," 369 U.S. at 226, 82 S.Ct. at 715. Subsequent decisions establishing the principle of individual electoral equality, *see Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), and applying the dilution doctrine, *see White v. Regester,* 412 U.S. 755, 93 S.Ct. 2342, 37 L.Ed.2d 314 (1973); *Whitcomb v. Chavis,* 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), have confirmed the Court's sanguine assessment of the judiciary's capacity to eliminate unfair treatment of voters as individuals and to enhance the prospects for effective political participation

by formerly disenfranchised racial minorities. A necessary concomitant to the formulation of constitutional principles governing the legality of particular types of apportionment plans has been the development of a federal common law of voting rights remedies. This appeal concerns such a remedy.

I. DALLAS CITY COUNCIL ELECTIONS

Three major racial groups make up the population of Dallas, Texas. Sixty five percent of Dallas' citizens are white; twenty five percent are black; and ten percent are Mexican-American[1] or chicano. Prior to the 1975 elections, the Dallas City Council was selected in the following manner. The City was divided into eight residential districts; eight "places" on the council ballot were reserved for candidates who resided in each of the respective districts; three additional Council members, including the mayor, ran without regard to the residency requirement; but voting for all eleven seats was on an at-large basis. The result of the residency requirement plus at-large voting for all seats was that even though candidates carried black districts by huge majorities they were regularly defeated by opponents who carried the majority white vote city-wide.

Candidates for the Dallas City Council have traditionally been nonpartisan. No party primaries have ever been held, although a majority-vote requirement has necessitated run-off elections whenever a candidate for a particular "place" obtains only a plurality of the popular vote. Crucial to success in the Council elections has been the endorsement of the Citizens' Charter Association (CCA); approximately eighty percent of the candidates supported by this slating group have been victorious. Since 1969, the CCA has endorsed at least one minority group candidate for a City Council position in the biennial elections. At

[1] We use interchangeably the term Mexican-American and Chicano to comprehend that group, largely of Spanish-surnamed citizens, mostly of Mexican origin. *See Hernandez v. Texas,* 347 U.S. 475, 480, 74 S.Ct. 667, 98 L.Ed. 866.

the time the case was tried by the district court, two blacks and one Mexican-American were serving on the eleven-person City Council. All three had been supported by the CCA. No black or chicano had ever won a Council seat without CCA backing; few whites had, although Mayor Wise did win as an independent.

The district court has held that the at-large system of electing *all* Dallas City Council members unconstitutionally dilutes the voting strength of the black community of Dallas. *Lipscomb v. Wise*, 399 F.Supp. 782 (N.D.Tex. 1975). Mexican-Americans have also been recognized as an identifiable racial group for purposes of the fourteenth amendment, *see. e.g., Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed.866 (1954). But the district court's judgment here appealed from did not attempt to determine the constitutionality of the Dallas elections system with respect to chicanos, because all Mexican-American plaintiffs had been dismissed from the lawsuit for failure to comply with discovery orders. 399 F.Supp. at 784. Thus, for purposes of this appeal only, we must assume that no constitutional violation of the rights of Mexican-American citizens occurred under the at-large scheme.

II. PARAMETERS OF THE DISPUTE

The City of Dallas does not challenge the district court's holding that the all at-large system unconstitutionally diminishes the voting strength of Dallas' black citizens. The problem, instead, is the selection of an appropriate remedy. The district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional. That plan, known as the "eight/three" plan, provides for the establishment of eight single-member districts corresponding to the eight residential districts under the all at-large system. The additional Council members are to be elected at-large, with one of the at-large seats being designated as mayor. The plaintiff-appellants contend that the district court's decision must be reversed because (1) it employs at-large voting to fill three

Council seats; and (2) the district lines have allegedly been drawn so as to concentrate black voters in an impermissibly small number of districts, resulting in "cluster dilution." Representatives of the Mexican-American community, whom the district court permitted to intervene at the remedy stage of the lawsuit, also appeal and ask that we remand for findings concerning alleged unconstitutional dilution of the voting strength of Dallas' chicano citizens and for the development of an election plan that would remedy that alleged violation.

We note at the outset two limits on our decision here. First, if the election plan proposed and formally adopted by the City Council is (1) constitutional and (2) otherwise in accordance with the federal common law of voting rights remedies, it should be approved. *See Burns v. Richardson*, 384 U.S. 73, 85, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Wallace v. House*, 515 F.2d 619, 634-35 (5th Cir. 1975) (*Wallace I*), *vacated and remanded on other grounds*, 425 U.S. 947, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976), *on remand* 538 F.2d 1138 (5th Cir. 1976) (*Wallace II*). Second, it is concededly impossible that an eleven-member plan of any sort could be drawn for the city of Dallas which would create a "safe" single-member district for the Mexican-American commuity unless some form of cumulative voting, proportional representation, or crazy-quilt district boundaries were employed. Mexican-American citizens are so dispersed throughout Dallas that a safe single-member chicano district could be established only by increasing the size of the Council to twenty or twenty-two members. The largest concentration of Mexican-Americans in the City's plan for eight single-member districts is twenty percent of one district's population. Under the two alternate plans proposed by the plaintiffs, no more than thirty one percent of any district's population would be chicano. The Mexican-American intervenors themselves offered no proposed plans. This Court, on the facts of this case, has no authority to order the City of Dallas to double the size of its City Council. Therefore, as far as the effects of reapportionment on the Mexican-American community are

concerned, we are limited to the consideration of plans for an eleven-member Council.

III. THE PREFERENCE FOR SINGLE-MEMBER DISTRICTS

We have previously recognized Dallas' longstanding public policy in favor of at-large voting. *See Zimmer v. McKeithen,* 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc). It comes as no surprise, therefore, that the reapportionment plan proposed by the City is a "mixed" plan, containing eight single-member districts and three at-large seats. It cannot, however, be successfully maintained that the use of at-large voting to select three Council members is in itself constitutionally defective. *White v. Regester,* 412 U.S. 755, 765, 93 S.Ct. 2342, 27 L.Ed.2d 314 (1973) (multi-member districts are not *per se* unconstitutional); *Chapman v. Meier,* 420 U.S. 1, 15, 95 S.Ct. 751, 760, 42 L.Ed.2d 766 (1975) (Court "has upheld numerous state-initiated apportionment schemes using multi-member districts").

Appellants contend that the district court's approval of the City's proposed reapportionment plan must be reversed as an abuse of discretion. This contention is founded on the Supreme Court's recent decision in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976) (per curiam). In *East Carroll,* the district court had approved a municipal plan calling for the at-large election of all members of a parish police jury and school board. This Court reversed on constitutional grounds, holding that the all at-large system unconstitutionally diluted the voting power of black citizens. *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc). The Supreme Court, however, expressly avoided disposition of the case on constitutional grounds. 424 U.S. at 639, 96 S.Ct. 1083. Rather, the Court affirmed our decision on the basis of the

rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances . . . . As the en banc opinion of the Court of Appeals amply demonstrates, no special circumstances here indicate the use of multimember districts. Thus we hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member reapportionment plan.

424 U.S. at 639-40, 96 S.Ct. at 1085; accord, *Paige v. Gray,* 538 F.2d 1108, 1111 (5th Cir. 1976); *Wallace v. House,* 538 F.2d 1138, 1142 (5th Cir. 1976)."

IV. THE MEXICAN-AMERICAN AS CREATING A "SPECIAL CIRCUMSTANCE"

Here, the district court approved the City's eight/three plan on the following basis:

> "I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting . . . . The Court finds that an exclusive single-member district plan would do nothing to increase the opportunity for Mexican-American participation in the political life of Dallas and might tend to decrease it. . . . [I]t is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters [which] would be unavailable in an exclusive single-member district voting plan. . . . Mexican-American citizens will, under the eight/three plan, have a heretofore unavailable flexibility and greater opportunity to participate in the political life of Dallas." 399 F.Supp. at 793-94.

Although a group of Mexican-Americans were originally plaintiffs in the district court, they were dismissed for failure to comply with discovery. 399 F.Supp. at 784. A class consisting of

Mexican-American voters were permitted to intervene at the remedy stage of the lawsuit, but the district court's finding of unconstitutionality concerned the voting strength of black citizens only. The intervenors presented no plans for reapportionment at the remedy stage. Their position can be fairly characterized as being in favor of any reapportionment plan that would create a "safe" Mexican-American seat on the Dallas City Council. Of course, no racial group has a constitutional right to be represented in a legislative assembly by a member of the group. On the other hand, representation by a person of one's own race is the most visible sign that a racial group has effective access to the political process and that the assembly will hear those concerns that are peculiar to the group. It is generally concluded that no single-member district will be dominated by chicanos who comprise only eight to ten percent of Dallas' population and whose residences are not geographically concentrated. The question on appeal is therefore whether the particular situation of Mexican-American citizens in Dallas constitutes a "special circumstance" within the contemplation of *East Carroll* and our opinion on remand in *Wallace v. House*. We think it does not.

The major difficulty with the district court's decision that a mixed plan would improve Mexican-American access to the political process is that there has never been a determination that their access has been unconstitutionally impaired. At the liability stage of the trial, there was no evidence presented concerning the voting rights of the dismissed chicano plaintiffs. At the remedy stage, the Mexican-American intervenors suggested that the voting power of chicanos had been diluted in the same fashion as the voting power of the black community. The City did not oppose these assertions. (Indeed, they furthered the City's position.) The trial court was ambivalent:

"The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to dilution. 399 F.Supp. at 793.

I conclude that Mexican-American citizens do not suffer from present dilution of their voting strength, and in fact, benefit to a significant extent from at-large voting.
399 F.Supp. at 793.

Mexican-Americans have entered to some extent into the political life of Dallas through the present at-large system. At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time, however, it is clear that at-large voting offers features which allow greater participation in the political processes within Dallas for Mexican-American voters [which] would be unavailable in an exclusive single-member district voting plan." 399 F.Supp. at 794.

Thus, for purposes of this appeal, we must assume that the former all at-large system was not unconstitutional with respect to Dallas' chicano community. The problem that the chicano office seeker faces in Dallas is that only eight to ten percent of Dallas' citizens are Mexican-Americans. In any election contest dominated by racial or ethnic block voting, a Mexican-American will always come in third to the white candidate and the black candidate. Chicano politics in Dallas must be the politics of coalition.

Furthermore, we find most enlightening on this matter of the relative advantages of eight/three and eleven/zero systems to Mexican-Americans a pleading filed on their behalf pending this appeal. The trial court expressly retained jurisdiction of the case for possible future modifications. Shortly after the trial court judgment an election was held at which a member of the class was defeated for one of the at-large posts. Thereafter, counsel for the Mexican-American intervenors filed a motion with the trial court for a further hearing as to the correctness of the trial court's order approving the eight/three city council. In support of this motion, counsel made the following statements:

"Intervenors would show the Court that under the approved 8/

3 plan Mexican-Americans are restricted in their access from entering into the political life of Dallas. It is clear that At Large voting does not offer features which allow greater participation in the political process within Dallas for Mexican-American voters, but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningfully in the election process.

Intervenors would show the Court that the results of the election of April 1, 1975, and other additional evidence will establish that Mexican-Americans are being denied representation and do suffer from the present dilution of their voting strength and do not benefit to a significant extent from At Large voting."

Thus, it will be seen that by pleadings filed by them, a class for whose benefit the trial court sought to act, has not only disclaimed the "benefit" but also denied the basis on which it rests.

We conclude that (1) as far as this record is concerned, chicano "access" to the political process of Dallas need not be improved since it is *ex hypothesi* the same "access" as that of white persons; and (2) the district court's opinion was based on a theory of electoral politics that applies as well if not better to single-member districts than to at-large elections. Thus, the situation of the Mexican-American voters does not constitute a special circumstance within the contemplation of the cases which require that absent such special circumstances, the city's legislative body be elected from single members districts.

V. ELECTION OF MAYOR

No showing has been made as to the city's preference for the election of a mayor[2] if the City is to operate with an eleven

[2] The mayor's office in Dallas is what is known as a "weak mayorality." That official merely presides over council meetings and represents the City. He has no legislative powers *qua* mayor. He has no veto powers. City government is administered by a City Manager.

member council chosen by districts. Under the present plan, he is required to be the city-wide candidate for "position" No. 11 of one of the at-large posts. The City may provide for the election of the mayor by general city-wide election or by election by City Council.

VI. CONCLUSION

Therefore, the order appealed from is reversed and remanded with instructions for the district court to require the City to reapportion itself into an appropriate number of single-member districts for the purpose of holding City Council elections. Should the City fail to propose an acceptable plan, the court shall formulate its own plan. The trial court shall also consider the appellant's claim here that he is entitled to attorney's fees for all services through the completion of this appeal. *See* 42 U.S.C.A. § 1988 (Supp. 1977).

REVERSED AND REMANDED.

Albert L. Lipscomb, et al.,
Plaintiffs-Appellants Appellees,
v.
The Honorable Wes Wise, Mayor of
the City of Dallas, et al., etc.,
Defendants-Appellees,
v.
Adelfa B. Callejo, et al., Intervenors-Appellants.

No. 75-2605.

United States Court of Appeals,
Fifth Circuit.

July 13, 1977.

Appeal from the United States District Court for the Northern District of Texas, 399 F.Supp. 782, Eldon B. Mahon, Judge.

ON PETITIONS FOR REHEARING

Before TUTTLE, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed on behalf of plaintiffs-appellants appellees and intervenors-appellants in the above entitled and numbered cause be and the same are hereby DENIED.

The concluding paragraph of the opinion, 551 F.2d 1043, is modified to read as follows:

VI. CONCLUSION

Therefore, the order appealed from is reversed and remanded with instructions for the district court to require the City to reapportion itself into an appropriate number of single-member

districts for the purpose of holding City Council elections. Should the City fail to propose an acceptable plan, the court shall formulate its own plan. The trial court shall also consider the appellant's claim here that he is entitled to attorney's fees for all services through the completion of this appeal. *See* 42 U.S.C.A. § 1988 (Supp. 1977).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 75-2605

Albert L. Lipscomb, et al.,
Plaintiffs-Appellants-Appellees,
versus
The Honorable Wes Wise, Mayor of
the City of Dallas, et al., etc.,
Defendants-Appellees,
versus
Adelfa B. Callejo, et al.,
Intervenors-Appellants.

Appeal from the United States District Court for the
Northern District of Texas

ORDER:

(X) The Motion of APPELLEES for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. See Fifth Circuit Local Rule 15, as amended January 11, 1972.

.....
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

No. A-149

WES WISE, ET AL.,
Applicants,
v.
ALBERT L. LIPSCOMB, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the applicants, the responses filed thereto, and the reply of the applicants,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Fifth Circuit in case No. 75-2605, issued August 8, 1977 be recalled, and the judgment of that court stayed, pursuant to my in-chambers opinion released today, pending the timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for writ of certiorari is granted, this order is to continue in effect pending the sending down of the judgment of this Court.

/s/ Lewis F. Powell
Associate Justice of the Supreme
Court of the United States

Dated this 30th day of August, 1977.

SUPREME COURT OF THE UNITED STATES

No. A-149

Wes Wise, et al., Applicants

v.

Albert L. Lipscomb et al.

On Application for Stay.

[August 30, 1977]

MR. JUSTICE POWELL, Circuit Judge.

This is an application for a stay of the judgment and recall of the mandate of the United States Court of Appeals for the Fifth Circuit. That judgment directs the District Court for the Northern District of Texas to require the exclusive use of single-member districts in the election of the Dallas city council. Applicants, the mayor and city council of Dallas, contend that any redistricting pending review by this Court could have the effect of mooting the case and defeating this Court's jurisdiction.

I.

Before 1975 the 11 members of the Dallas city council were elected by an exclusively at-large system of voting. Eight places on the ballot were reserved for candidates who resided in one of the city's eight residential districts. Three seats, including the mayor's, were open to candidates regardless of residence. Voting for all 11 seats was citywide. For many years council elections have been nonpartisan, involving slating groups rather than political parties. Electoral success has depended in major part upon support of one such group, the Citizens' Charter Association.

Plaintiffs representing Negro citizens of Dallas challenged this election system in 1971. Certain Mexican-Americans intervened, but were dismissed from the case for failure to respond to interrogatories. In 1975, the District Court concluded that the at-large election system unconstitutionally diluted the vote of Dallas' Negro citizens. The court rested this conclusion on

findings dealing with the geographic concentration of Negroes within the city, the effect of slating groups, and the city's history of *de jure* discrimination.

Instead of formulating its own districting plan, the court afforded the city council an opportunity to enact a valid plan. The council duly adopted an ordinance that provides for election of a council member from each of eight single-member districts, the remaining three to be elected from the city at large. After careful examination of this plan, the District Court approved it. The court observed that single-member districts generally are preferable, but concluded that several facts weighed in favor of the city's new system. First, the court noted that any plan which did not consider the effect on Mexican-American voters might itself be constitutionally suspect. Indeed, detailed consideration of the plan's effect upon those voters, who were more geographically dispersed than Negro citizens, convinced the District Court that their electoral power would be enhanced. Second, the new plan permitted some citywide representation in a body that functioned as a legislature for the entire city. At-large voting in Dallas dated back to 1907, and there was no showing that its use in the new plan would have adverse effects on any minority. The court found a recent marked improvement in the political participation and general posture of minority groups in Dallas.[1]

On appeal, the Court of Appeals reversed. Relying primarily on *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976), and apparently drawing no distinction in this respect between court-ordered and legislatively enacted redistricting, the court held that absent unusual circumstances single-member districts are to be preferred. It concluded that no such circumstance existed. The case thereupon was remanded with instructions that the city redistrict itself into an appropriate

[1] As noted in the opinion of the District Court, the racial composition of the Dallas city council in 1975 was two Negroes, one Mexican-American, and eight whites. 399 F.Supp. 782, 787 n. 5 (N.D. Tex. 1975).

number of single-member districts. A rehearing was denied, and a requested stay of mandate was refused.

II.

Applicants level three charges of error at the judgment below. First, they contend that the Court of Appeals improperly ignored the distinctions drawn by this Court between state-enacted and court-ordered reapportionment plans. Applicants further argue that the court erroneously held that the city, in fashioning a remedy to correct unconstitutional dilution of the voting rights of one minority group, cannot consider the remedy's impact on other groups in the absence of an adjudication that the other group's rights also were impaired unconstitutionally. Applicants final claim is that the court below erred in failing to consider the city's need for some citywide representation.

This Court has declared repeatedly that the standards for evaluating the use of multimember and at-large voting plans differ depending on whether a federal court or a state legislative body initiated the use. *E.g., Chapman v. Meier,* 420 U.S. 1, 18 (1975); see *Connor v. Finch.* ____U.S.____, 97 S.Ct. 1828, 1833 (1977). When a federal court imposes a reapportionment plan upon a State, single-member districts are preferable in the absence of unusual circumstances. *East Carroll Parish School Bd., supra,* at 639. But "legislative reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims,* 377 U.S. 533, 586 (1964). When the State accepts this responsibility, its decisions as to the most effective reconciling of traditional policies should not be restricted beyond the commands of the Equal Protection Clause. *Burns v. Richardson,* 384 U.S. 73, 85 (1966); cf. *Connor v. Finch,* ____U.S., at ____, 97 S.Ct., at 1833. The Court of Appeals, by holding the Dallas city council to the "unusual circumstances" test of *East Carroll Parish School Bd.,* appears to have confused these two standards.[2]

[2] The distinction is between a court-*ordered* plan, which may or may not have been proposed by a legislative body, and a court-*approved* plan, which has been initiated and promulgated as law by the legislative body. *East*

While we have never explicitly held that municipal election plans are entitled to the same respect accorded those of state legislatures, there is reason to believe that they should be. We indicated as much in *Chapman v. Meier, supra,* at 27:

> "[R]eapportionment is primarily the duty and responsibility of the state through its legislature or other body rather than of a federal court."

(Citing *Reynolds v. Sims,* 377 U.S. 533 (1964).) See also *Dusch v. Davis,* 387 U.S. 112, 116-117 (1967).

The two additional errors advanced by applicants also may have merit. The view of the court below that a plan's effect on various minority groups can be considered only after an adjudication of unconstitutional impairment as to those groups may be incompatible with the rationale of our recent decision in *United Jewish Orgs. v. Carey,* ____U.S.____, 97 S.Ct. 996 (1977). See also *Gaffney v. Cummings,* 412 U.S. 735, 752-754 (1973)[3] Moreover, no apparent weight was given the express findings of the District Court with respect to the legitimate interest of the city in "having some at-large representation on [its] City Council." 399 F.Supp., at 795.[4] I had thought it clear that a federal court

Carroll Parish School Bd. involved the former, and this Court noted that "in submitting the plan to the District Court, the [police] jury did not purport to reapportion itself in accordance with the 1968 enabling legislation . . . ." 424 U.S., at 639 n. 6. Here, by contrast, "[t]he district court approved the City's plan for relief, which was enacted as a city ordinance following the court's decision that the prior system was unconstitutional." 551 F.2d 1043, 1045 (CA5 1977). Thus, a rule of limited deference to local legislative judgments is appropriate in this case, for as we held in *Burns v. Richardson,* 384 U.S., at 85, "a State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause."

[3] The opposition to the new plan of certain Mexican-American voters does not render the District Court's findings in this respect automatically invalid. Those intervenors were never certified as the representatives of any class.

[4] After alluding to the evidence and to the concession by the plaintiffs (who had themselves proposed a plan involving the citywide election of the member of the council designated as mayor), the District Court found:

> "The Court believes and so finds that there is a legitimate governmental interest to be served by having some at-large representation on the

reviewing a reapportionment plan should consider and give appropriate weight to any valid state or municipal interest found to be furthered by the plan under consideration. See, *e.g.*, *Reynolds v. Sims, supra,* at 578-581. Citywide representation appears to be such an interest. Cf. *Dusch, supra; Fortson v. Dorsey,* 379 U.S. 433, 438 (1965).

III.

The general principles that guide a Circuit Judge with respect to stay applications are well settled. The judgment of the court below is presumed to be valid, and absent unusual circumstances we defer to the decision of that court not to stay its judgment. Moreover, the party seeking a stay bears the burden of advancing persuasive reasons why failure to grant could lead to irreparable harm. In light of the foregoing considerations, the Circuit Judge must make a judgment whether there is a "reasonable probability that four members of the Court will consider the issue sufficiently meritorious to grant certiorari." *Graves v. Barnes,* 405 U.S. 1201, 1203 (1972).

I think there is a reasonable probability that at least four Members of the Court will grant certiorari in this case. The case involves a major city that has adhered to its tradition of at-large elections since 1907.[5] As indicated above, the Court of Appeals may well have thought that the principles applicable to a state legislative redistricting did not apply with full force to such action by a city council. It also appears likely that established principles of general application in the redistricting cases were not applied correctly. Applicants also claim irreparable injury unless a stay is

Dallas City Council; that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole, e.g., zoning, budgets, and city planning; and that three at-large members do not render the city's plan constitutionally infirm." 399 F.Supp., at 795 (footnote omitted).

[5] The District Court found:

"... that at-large voting, especially on the municipal level has been an integral part of Texas local governments [since 1907 in Dallas] and that at-large voting schemes have their genesis in reasons other than those racially motivated." 399 F.Supp., at 797.

granted. Although the next regular election is not scheduled until April 1979, if the judgment of the Court of Appeals is not stayed, experience indicates that respondents will press promptly for a special election. In their response to this application, they comment that a stay "would unjustifiably prolong" an appropriate remedy. If the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted. In any event, in a situation of this kind the capacity of the incumbent council to function effectively in the public interest may be impaired if the judgment is not stayed.

I will, therefore, enter an order recalling the mandate and staying the judgment of the Court of Appeals pending disposition of the petition for certiorari.

(1) Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596.

> "1. All powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and four commissioners, who together shall be known and designated as the board of commissioners, all of whom shall be elected by the qualified viters of the city at large, and shall devote their entire time to the service of the city."

(2) Charter of the City of Dallas, 1931, ch. III, sec. 9, at 16:

> "Section 9. Except as otherwise provided by the Charter of the City of Dallas all powers conferred on the City shall be exercised by a City Council to be comprised of nine members, nominated and elected in the manner hereinafter provided. The members of the City Council shall be elected by the qualified voters of the entire city, and they shall each be elected for a term of two years and until their respective successors shall have been elected and shall have qualified."

(3) Charter of the City of Dallas, 1931, as amended 1973, ch. IV, sec. 4 at 19:

> "All qualified voters of the city shall be entitled to vote for one candidate for each 'place number'."

(4) City of Dallas Resolution Number 75-0207, sec. 1:

> "Section 1. That the City Attorney be, and he is hereby directed to notify the Judge of the United States District Court for the Northern District of Texas, Dallas Division, that it is the intention of the majority of this City Council to pass an ordinance, when prepared by the City Attorney, which will adopt the present eight residential districts as single member districts, with one individual Councilman to be elected from each of the districts and living in the district, and with three individuals, including the Mayor, to be elected at-large with no residential requirements other than that the candidate live within the City limits of Dallas."

(5) Ordinance Number 14800 of the City of Dallas, sec. 2:

> "Section 2. As a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al., v. Wes Wise, et al., CA3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7 and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

NO. 77-529

WES WISE, ET AL.,

Petitioners

v.

ALBERT L. LIPSCOMB, ET AL.,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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STATEMENT OF THE CASE

Respondents dispute the contention of Petitioners that subsequent to a finding of the trial court's determination that the at-large election scheme was unconstitutional that the City Council reapportioned itself, adopting the eight single-member, three at-large election scheme now challenged. In fact, on January 17, 1975, after a lengthy hearing during which the City of Dallas vigorously defended its existing at-large election scheme, the trial court found such system unconstitutional and ordered the City Council to present a constitutional plan for the Court's consideration. (Appendix B, p. B-3). The City Council then adopted a resolution directing the City Attorney to advise the trial court that it was its intention to adopt the eight - three plan now at issue. (Appendix A, p. A-1). Subsequently, an ordinance was passed specifically stating that "[a]s a result of the decision of the United States District Court for the Northern District of Texas .... and this Ordinance enacted pursuant thereto," the present election scheme was adopted. (Appendix A, p. A-2). A hearing was held on February 8, 1975, during which several plans were presented for the trial court's consideration. At that time the trial court ordered that the plan offered by the City Council be instituted. (Appendix B, p. B-27). Thus, it is inaccurate to contend that the City Council reapportioned itself. In fact, the City Council is legally unable to reapportion

itself. The election system is established by City Charter, and can only be amended by a majority vote of registered voters. The City Council cannot on its own modify the Charter to alter the election system. (Appendix B, p. B-31).

REASONS FOR REFUSING THE WRIT

1) THE COURT OF APPEALS ADOPTED THE CORRECT AND PREVAILING LEGAL STANDARD IN HOLDING THAT THE EIGHT - THREE PLAN ADOPTED BY THE TRIAL COURT WAS IMPROPER.

Respondents contend that the decision of the United States Court of Appeals for the Fifth Circuit accurately applies the federal common law of voting rights remedies. That standard was recently expressed in East Carroll Parish School Board v. Marshall, 424 US 636, 639, (1976) as follows:

> We have frequently reaffirmed the rule that when United States District Courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances.

The specific facts in East Carroll are remarkably similar to the instant case. In that case, a white resident of the parish challenged population disparities among the wards of the parish. After a hearing, the district court agreed, and adopted an at-large reapportionment plan suggested by the parish police jury. Subsequently, new hearings were held after the 1970 census. The police jury submitted an at-large plan. Stewart Marshall, a black citizen of the parish was permitted to intervene. Marshall

contended that at-large elections diluted the black vote. The District Court adopted the at-large plan presented by the parish, and found that the at-large plan would not diminish the black voting strength. An en banc panel of the Fifth Circuit reversed the trial court finding of no dilution of black voting strength and rejected the use of the at-large plan on constitutional grounds. The Supreme Court affirmed without expressing approval of the constitutional views of the Fifth Circuit, but rather restating the rule of Connor v. Johnson, 402 U.S. 690 (1971) as expressed above.

A similar expression of the Supreme Court's application of the federal law of voting rights remedies can be seen in the history of Wallace v. House, 515 F.2d 619 (5th Cir. 1975), vacated and remanded, 425 U.S. 947 (1976), on remand 538 F.2d 1138 (5th Cir. 1976). In that case, the trial court determined that an all-at-large aldermanic election scheme in the City of Ferriday, Louisiana, unconstitutionally diluted the votes of the black citizens of the town. The trial court invited the Board of Aldermen and the plaintiffs to present plans for the court's consideration. The trial court rejected the Board's plan because it contained an at-large seat and adopted the plaintiffs' plan, which called for all single-member districts. Wallace v. House, 515 F.2d 619, 622, supra. The Fifth Circuit reversed, relying in part on the statement in Reynolds v. Sims, 377 U.S. 533, 586 (1964), that legislative apportionment is a matter for legislative determination, and the legislature must be given an opportunity to fashion a remedy. The United States

Supreme Court granted the petition for writ of certiorari, vacated the judgment and remanded the case in light of East Carroll Parish School Board v. Marshall, supra. On remand, the Fifth Circuit found that no special circumstances were found in the record to justify a holding that the trial court abused its discretion, and affirmed the trial court's all-single-member district plan. Wallace v. House, 538 F.2d 1136, supra.

Thus, both Wallace and East Carroll Parish have followed a course of litigation remarkably similar to the instant case. The uniform response of the Supreme Court has been to require that plans adopted by the courts be single-member plans absent unusual circumstances.

Petitioners' reliance on Reynolds v. Sims, supra, and Burns v. Richardson, 384 U.S. 73 (1966) is inappropriate to the facts now before this Court. In these earlier cases, there had been no evidence that multi-member districting had the effect of diluting racial minority voting strength. In the instant case, there was overwhelming evidence of this effect, so much so, in fact, that it was immediately suspect when the City Council presented a plan containing three at-large places. Also, these earlier cases involved bicameral state legislatures, with problems of federalism not present when cities are involved. See Burns v. Richardson, supra, p. 99 (J. Stewart, concurring). Finally, unlike a state legislature, the City Council itself had no power to reapportion itself. That could only be done by the voters of the City.

Clearly, then, the Court of Appeals in this case has followed with precision the federal common law of voting rights remedies as it has been developed by this Supreme Court.

2) THE COURT OF APPEALS CORRECTLY HELD THAT MEXICAN-AMERICANS DID NOT CREATE A SPECIAL CIRCUMSTANCE JUSTIFYING THE EIGHT - THREE PLAN.

The Mexican-American population in the City of Dallas comprises less than ten percent of the City's population and this housing pattern is such that they are spread throughout the city limits. (Appendix B, p. B-3). The trial court was itself ambivalent about the role of Mexican-Americans in any election system. The trial court found that Mexican-Americans had suffered some restrictions of access to the political processes but that those restrictions did not amount to dilution. (Appendix D, p. D-7). The trial court concluded that Mexican-Americans benefited from an at-large system. (Appendix D, p. D-7). Importantly, the Mexican-American intervenors in the lawsuit rejected the eight - three plan adopted by the trial court, and pointed to election results had under the eight - three plan to support their contention that at-large voting, in fact, diluted the voting strength of Mexican-Americans. (Appendix D, p. D-9).

The Court of Appeals found that under any theory, Mexican-Americans in the City of Dallas would fare as well, if not better, under a single-member system.

This is certainly the only reasonable conclusion that can be drawn from the evidence, and certainly negates any argument that Mexican-Americans are a special circumstance sufficient to justify the

at large features of the plan.

3) THE NEED FOR CITY-WIDE PERSPECTIVE CANNOT BE AN UNUSUAL CIRCUMSTANCE JUSTIFYING AN AT-LARGE ELECTION SCHEME.

The trial court attempted to justify the three at-large seats on the grounds that there was a need for a city-wide perspective on the council. (Appendix B, p. B-21). Regardless of whether or not this conclusion is supported in the record, it should be pointed out that the trial court made lengthy and detailed findings of the discriminatory aspects of life and politics in the City of Dallas experienced by minority black citizens. (Appendix B, p. B-4-9). The trial court found that the at-large election scheme restricted the access of black citizens to the political process. The court found that black voters vote for black candidates and that white voters vote for white candidates. (Appendix B, B-14). This being so, a "city-wide perspective" becomes an euphemism for the election of three white candidates. This is not the "unusual circumstance" contemplated in East Carroll Parish Police Jury, supra.

In fact, the only "unusual circumstance" cited by the Supreme Court for retaining at-large districts following a judicial finding of unconstitutionality was the close proximity of election day coupled with the lack of time to construct a single-member district. Mahan v. Howell, 410 U.S. 315 (1973)

CONCLUSION

Respondents respectfully pray that the petition for writ of certiorari to the United States Court of

Appeals be denied.

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CERTIFICATE OF SERVICE

I, James A. Johnston, certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served on Lee Holt, Esq. and George Solares, Esq. on this the 4th day of November, 1977, by placing in a depository of the United States Postal Service two copies of the Brief, with first class postage prepaid, addressed to each of the attorneys named above at his post office address, in compliance with the United States Supreme Court Rule 33(1),(3)(b).

James A. Johnston

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-529

WES WISE, et al.,
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v.

ALBERT L. LIPSCOMB, et al.,
Respondents,

v.

ADELPHA B. CALLEJO, et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENORS IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR INTERVENORS IN OPPOSITION

To The Honorable Judges of Said Court:

Intervenors in opposition oppose Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered May 9, 1977.

OPINIONS BELOW

The opinion of the district court is reported at 399 F.Supp. 782 (Pet. App. B, p. B-1 -B-2). The opinion of the court of appeals is reported at 551 F.2d 1043 (Pet. App. D, p. D-1—D-10).

JURISDICTION

The judgment of the court of appeals was entered May 9, 1977. (Pet. App. C, p. C-1). Rehearing by the court of appeals was denied on July 13, 1977. (Pet. App. E, p. E-1—E-2).

The mandate of the court of appeals was issued August 8, 1977. (Pet. App. C, p. C-1). The mandate of the court of appeals was recalled and the judgment of that court was stayed on August 30, 1977, by Mr. Justice Powell. (Pet. App. G, p. G-1). The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the court of appeals properly held that the rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) was controlling and that absent unusual circumstances the district courts' apportionment plan required a preference for single member districts.

(2) Whether the court of appeals properly disregarded any finding of legitimate interest of the City in having a city-wide perspective in municipal government which would be furthered by use of multi-member districts.

STATUTORY PROVISIONS INVOLVED

Petitioner's references to the provisions of statutes, charters, ordinances and resolutions are correctly set forth.

STATEMENT OF THE CASE

Black and Mexican-American voters filed suit on March 10, 1971, in the United States District Court for the Northern District of Texas seeking a determination that the at-large election of all city council members unconstitutionally diluted their voting strength. At the time of the filing of this suit, all eleven council members were elected at-large from the entire city. *Lipscomb v. Wise*, 399 F.Supp. 782, 785 (N.D. Tex. 1975), Pet. App. B, P. B-4.

During the course of the pre-trial preparation, the class of Mexican-American voters were dismissed from the suit for failure of the individual class representatives to answer the interrogatories propounded by the City. On July 16, 1975, certain Mexican-American residents of the City of Dallas sought to intervene but the district court denied their motion.

On January 17, 1975, the district court held that the at-large election of all council members was unconstitutional and ordered the City to submit a remedial plan. *Lipscomb v. Wise, supra*, 339 F.Supp. at 792, Pet. App. B, p. B-16. In reply to this order the City submitted an "eight-three plan" which required the election of eight council members from single member districts and provided that the three

remaining members, one of whom to serve as mayor, be elected at-large. *Lipscomb v. Wise, supra*, 399 F.Supp. at 791, Pet. App. B., p. B-15.

Hearings were then resumed in district court to review the "eight-three" councilmanic election scheme enacted by the city council. The district court permitted the Mexican-American Intervenors to participate for the first time in this litigation for the limited purpose of "[determining] the constitutionality of the proposed plan by the City." (R. Vol. IX, p. 4).

In February, 1975, the district court ruled that the "eight-three" councilmanic scheme met constitutional standards and ordered the April, 1975, councilmanic elections to be held pursuant to this redistricting proposal. Shortly after these elections were held, Mexican-American Intervenors filed a Motion for Further Relief stating that the sole Mexican-American council member incumbent was soundly defeated for one of the at-large council posts. The Mexican-American Intervenors alleged that this defeat clearly demonstrated "that At-Large voting does not offer features which allow greater participation in the political process within Dallas for Mexican-American voters; but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningfully in the election process." *Lipscomb v. Wise*, 551 F.2d 1043, at 1048 (5th Cir. 1977), Pet. App. D. p. D8-D9.

The Court of Appeals for the Fifth Circuit reversed and remanded the decision of the district court and held that "the particular situation of Mexican-American citizens in Dallas did not constitute a special circumstance within the contemplation of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976)" which would justify the election of three of the eleven council members other than the mayor. *Lipscomb v. Wise*, 551 F.2d 1048, Pet. App. D. p. D-7.

All parties petitioned for rehearing and the court of appeals denied those petitiones on July 13, 1977. (Pet. App. E, p. E-1). The court of appeals denied petitioners' motion for stay of the mandate of that court. (Pet. App. F, p. F-1).

The mandate of the court of appeals was recalled and the judgment of that court stayed by order of Mr. Justice Powell on August 30, 1977. (Pet. App. G, p. G-1).

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Properly Held That The Rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) Was Controlling and That Absent Unusual Circumstances, the District Court's Reapportionment Plan Should Have a Preference for Single Member Districts.

This Court has recently reaffirmed the rule that when district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single member districts are to be preferred absent unusual circumstances. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636,

at 639. In making this pronouncement, the *East Carroll* Court was not articulating a new test but refining a test first announced in *Conner v. Johnson*, 1971, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed. 2d 268, (per curiam), *Wallace v. House*, 538 F.2d 1138, 1144 (5th Cir. 1976).

The pronouncement of *East Carroll* is clear and a district court need not reject an all-at-large or mixed plan as unconstitutional in order to justify its choice of an all-single-member plan. A reviewing court need not reach the constitutionality of the mixed plan to decide whether the district court's choice was proper. *Wallace v. House, supra*, 538 F.2d at 1142.

In the instant case, the Court of Appeals for the Fifth Circuit did not have to determine the constitutionality of the mixed "eight-three plan" but acknowledged that the use of at-large voting to select three council members is not in itself constitutionally defective. *Lipscomb v. Wise*, 551 F.2d 1043, Pet. App. D, p. D-5. Concededly, the court of appeals did not purport to determine the constitutionality of the City's "eight-three plan", but held that the plan was contrary to federal common law and invalid because there was no special circumstances to justify the use of the three at-large positions within the contemplation of *East Carroll*. *Lipscomb v. Wise, supra*, 551 F.2d at 1048, Pet. App. D, p. D-9.

Because of the court of appeal's holding that the "eight-three plan" is in conflict with the special circumstance test of *East Carroll*, Petitioner contends that the court of appeals has incorrectly established a rule of conflict with this Court's prior decisions that a

state initiated plan, such as the "eight-three plan" must meet the "clear commands of the Equal Protection Clause" and not the special circumstance test of *East Carroll*. Furthermore, it is alleged that the decision of the court of appeals has eliminated the distinction drawn by this Court between court ordered and state-initiated reapportionment plans and their respective standards of review. *Chapman v. Meier*, 420 U.S. 1, 18 (1977). *Conner v. Finch, U.S.*, 97 S.Ct. 1828, 1833 (1977).

It has been determined that the all-at-large system of electing council members has unconstitutionally diluted the voting strength of Black Americans in Dallas. *Lipscomb v. Wise, supra*, 399 F. Supp. 782 (N.D. Tex. 1975), Pet. App. B; *Lipscomb v. Wise, supra*, 551 F. 2d at 1045, Pet. App. D, p. D-3. To correct the constitutionally defective all-at-large system, the Petitioner proposed a state-initiated "eight-three plan" which was adopted by the district court. *Lipscomb v. Wise, supra*, 551 F.2d at 1045, Pet. App. D, p. D-5. The district court in adopting this "eight-three plan" abused its discretion in not initially ordering a single-member plan as contemplated by *East Carroll*. *Lipscomb v. Wise, supra*, 551 F.2d at 1046, Pet. App. D, p. D-6.

The decision of the court of appeals evidences a literal following of *East Carroll*. The district court had the duty of "shaping remedial relief". In doing so, the district court erroneously adopted the state-initiated "eight-three plan" and should have initially, when confronted with the task of "shaping remedial relief", ordered a single-member reapportionment plan. The

court of appeals did not have the task of scrutinizing the apportionment plans under their different review standards since this is not a requirement of *East Carroll School Board v. Marshall, supra*, 424 U.S. at 639.

The court of appeals, however, did not stop its decision at this juncture but proceeded to consider the appropriateness of the state-initiated "eight-three plan". This court in *East Carroll* found it unnecessary to reach the constitutional merits of the proffered at-large plan but expected the district court to engage in this task. The district court in failing to consider the special circumstances in *Conner v. Johnson, supra*, 402 U.S. 690, abused its discretion in failing initially to order a single-member reapportionment plan. *East Carroll School Board v. Marshall, supra*, 424 U.S. at 639.

Similarly, in the instant case, the court of appeals finding that there was no special circumstance which called for other than a single-member plan, properly held that the district court abused its discretion in failing initially to order a single-member reapportionment plan.

The Petitioners, however, have sought to create a distinction between court ordered and court approved plans for purposes of determining if whether a single-member plan should be instituted once an at-large election system has been found to be unconstitutional. Such a distinction is artificial and would serve to encourage the adoption of makeshift at-large election systems which, as demonstrated in the case at bar,

would have the effect of excluding racial minorities from the electoral and political processes.

Such a distinction between court ordered and court approved plans was not recognized by the court of appeals. Instead, that court correctly followed clearly established precedent in this voting rights area by applying the rule reaffirmed in *East Carroll* and held that there was no special circumstances warranting the implementation of a districting plan other than a single-member plan.

2. The Court of Appeals Properly Disregarded the District Court's Finding That There Was A Legitimate Interest in Having a City-Wide Perspective in Municipal Government Which Would Be Furthered By Use of Multi-Member Districts.

Albeit, Mexican-Americans were found to have a significant interest in the subject matter of this litigation by the district court, *Lipscomb v. Wise, supra*, 399 F. *supp.* at 793, Pet. App. B, p. B-18, neither the district court nor the court of appeals held that their access to the political process had been unconstitutionally impaired. *Lipscomb v. Wise, supra*, 551 F. 2d at 1048, Pet. App. D, p. D-7.

Furthermore, the district court made various findings concerning the Mexican-American situation which would negate a conclusion that they create a special circumstance to justify at-large features of the "eight-three plan." *Lipscomb v. Wise*, 399 F. Supp. at 795, Pet. App. B, p. B-20. The district court found that Mexican-American citizens have suffered restrictions of access similar to Black Americans and

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that slating group operations have contributed to this restriction. 399 F. Supp. at 795, Pet. App. B. p. B-20.

Conceding that these findings were correct and properly made by the district court, it is inconceivable that any type of a mixed at-large plan could offer anything for Mexican-Americans, much less a city wide perspective in municipal government. Where Mexican-Americans have never been able to elect a Mexican-American candidate without the endorsement of a white slating group, *Lipscomb v. Wise*, 551 F.2d at 1045, Pet. App. D, p. D-3, there is no possibility of achieving a city wide perspective for Mexican-Americans for their perspective will be effected by the benefactors who endorsed them.

Knowing that at-large voting offered no features which would allow greater Mexican-American participation, the Mexican-American Intervenors did not endorse any mixed at-large plan nor did they submit one having any at-large features. *Lipscomb v. Wise*, 551 F. 2d at 1046, Pet. App. D, p. D-4. At-large features were of no benefit to Mexican-Americans and recognizing that a city-wide perspective under an "eight-three plan" was speculative if nonexistent, Mexican-American Intervenors opposed the adoption of the "eight-three plan". *Lipscomb v. Wise*, 551 F. 2d at 1051, Pet. App. D, p. D-9.

The Court of Appeals acknowledged this opposition and found enlightening the Motion for Further Relief filed by the Mexican-American Intervenors wherein the relative advantages of the "eight-three" system were disclaimed after the Mexican-American at-large

candidate was soundly defeated. *Lipscomb v. Wise*, 551 F. 2d at 1050, Pet. App. D, p. D-8. Clearly, a mixed at-large system which can systematically exclude Mexican-American representation in the city council cannot offer the additional feature of a city-wide perspective in municipal government for the Mexican-American.

CONCLUSION

For the foregoing reasons, Intervenors respectfully submit that the petition for writ of certiorari to the United States Court of Appeals should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereb certify that a true and correct copy of the foregoing Brief for Intervenor in Opposition was mailed, via United States Mail, postage pre-paid, to Mr. Lee E. Holt and Mr. Joseph G. Werner, Attorneys for Petitioners; Mr. James A. Johnson, Mr. Edward B. Cloutman, III, Mr. Walter L. Irvin, Mr. Samuel Foutz, Attorneys for Respondents, on this the ..... day of November, 1977.

.....

George Solares

Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, etc., et al.,

Petitioners,

v.

ALBERT L. LIPSCOMB, et al.,

Respondents.

PETITIONERS' BRIEF ON THE MERITS

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Respondents.

PETITIONERS' BRIEF ON THE MERITS

To the Honorable Judges of Said Court:

Petitioners respectfully submit the following brief on the merits.

CITATIONS TO OPINIONS BELOW

The opinion of the district court is reported at 399 F.Supp. 782 (A. 121). The opinion of the court of appeals is reported at 551 F.2d 1043 (A. 168).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

The judgment of the court of appeals was rendered and entered May 9, 1977 (A. 167).

Rehearing was denied July 13, 1977 (A. 178).

The mandate of the court of appeals was issued August 8, 1977 (A. 167). The mandate of the court of appeals was recalled and the judgment of that court was stayed by order of Mr. Justice Powell, dated August 30, 1977 (A. 181).

The petition for writ of certiorari was granted January 9, 1978.

STATUTES, CHARTERS, ORDINANCES AND RESOLUTIONS INVOLVED

The case involves the following provisions of statutes, charters, ordinances and resolutions:

(1) Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596:

> "1. All powers conferred on the city shall, unless otherwise provided in this charter, be exercised by a mayor and four commissioners, who together shall be known and designated as the board of commissioners, all of whom shall be elected by the qualified voters of the city at large, and shall devote their entire time to the service of the city."

(2) Charter of the City of Dallas, 1931, ch. III, sec. 9:

> "Section 9. Except as otherwise provided by the Charter of the City of Dallas all powers conferred on the City shall be exercised by a City Council to be composed of nine members, nominated and elected in the manner hereinafter provided. The members of the City Council shall be elected by the qualified voters of the entire city, and they shall each be elected for a term of two years and until their respective

> successors shall have been elected and shall have qualified."

(3) Charter of the City of Dallas, 1931, as amended 1968, ch. IV, sec. 4:

> "All qualified voters of the city shall be entitled to vote for one candidate for each 'place number'."

(4) Charter of the City of Dallas, 1931, as amended 1968, ch. IV, sec. 6:

> "No person shall be eligible as a candidate for member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, unless he is at the time a bona fide resident of District 1, 2, 3, 4, 5, 6, 7 and 8 respectively, and has resided therein for a period of at least six (6) months prior to the date of the election. He must continuously reside in said district during his term of office. A candidate for Place Numbers 9, 10 or 11 may be a resident of any portion of the City, and must continuously reside within the City during his term of office."

(5) Charter of the City of Dallas, 1931, as amended 1973, ch. II, sec. 2:

> "The enumeration of particular powers in the charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated herein, implied thereby or appropriate to the exercise thereof, the city shall have and may exercise all other powers which under the Constitution and laws of the State of Texas, it would be competent for the charter specifically to enumerate. The city shall have and exercise all the powers conferred upon cities by what is known as the Home Rule Amendment to the Constitution of the State of Texas and the Enabling Act relative thereto, passed by the Thirty-Third Legislature of the State of Texas, found in the published laws of said legislature, Regular Session, pages 307 to 317 and effective July 7, 1913, and all other laws passed by the legislature of the State of Texas, relating thereto, or which may hereafter be passed by said legislature in relation to such matters."

(6) Charter of the City of Dallas, 1931, as amended 1973, ch. XVIII, sec. 1:

"The city council shall evidence its official actions by written ordinances, resolutions or oral motion. The use of one method or the other shall not affect the validity of the action, except in those instances where one or the other is required by state law or this charter."

(7) Charter of the City of Dallas, 1931, as amended 1973, ch. XXIV, sec. 16:

"The enumeration of powers made in this charter shall never be construed to preclude, by implication or otherwise, the city from exercising the powers incident to the judgment of local self-government, nor to do any and all things not inhibited by the Constitution and laws of the state of Texas."

(8) City of Dallas Resolution Number 75-0207, sec. 1:

"Section 1. That the City Attorney be, and he is hereby directed to notify the Judge of the United States District Court for the Northern District of Texas, Dallas Division, that it is the intention of the majority of this City Council to pass an ordinance, when prepared by the City Attorney, which will adopt the present eight residential districts as single member districts, with one individual Councilman to be elected from each of the districts and living in the district, and with three individuals, including the Mayor, to be elected at-large with no residential requirements other than that the candidate live within the City limits of Dallas."

(9) Ordinance Number 14800 of the City of Dallas, sec. 2:

"Section 2. As a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al. vs. Wes Wise, et al., CA3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7 and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11."

(10) Charter of the City of Dallas, 1931, as amended 1976, ch. III, sec. 1:

"Except as otherwise provided by the charter of the city, all powers conferred on the city shall be exercised by a city council to be composed of eleven (11) members, nominated and elected in the manner hereinafter provided unless otherwise provided by law. Three (3) members of the city council shall be elected by the qualified voters of the entire city, and eight (8) by the qualified voters residing in a particular district as provided in Chapter IV of this Charter and they shall each be elected for a term of two (2) years. The council members so elected shall take office on the first Monday in May succeeding the election and they shall serve until their respective successors shall have been elected and shall have qualified."

QUESTIONS PRESENTED FOR REVIEW

(1) May the court of appeals disregard the rule, established by this Court in *Reynolds v. Sims*, 377 U.S. 533 (1964), and *Burns v. Richardson*, 384 U.S. 73 (1966), that a State's freedom of choice to devise substitutes for unconstitutional apportionment plans should not be restricted beyond the clear commands of the Equal Protection Clause?

(2) May a State, in fashioning remedies to correct an unconstitutional dilution of the voting rights of one minority group, consider the voting rights of a second minority group, even though there has been no judicial determination that the voting rights of the second minority have been unconstitutionally impaired?

(3) May the court of appeals invalidate a state-initiated use of at-large voting which is based upon the need for representation of a city-wide perspective in municipal government, where there has been no finding that such at-large voting invidiously minimizes or cancels out the voting strength of any identifiable group?

THE PARTIES

Petitioners are the mayor and members of the City Council of the City of Dallas, Texas.

Respondents are a class composed of the Negro citizens of the City of Dallas, who were plaintiffs in the district court, and a group of Mexican-American intervenors who were denied class certification in the district court (A. 26-28).

STATEMENT OF THE CASE

The legislative powers of the City of Dallas, a home-rule city, are exercised by an eleven-member city council.

At the time this legislation was begun all eleven members were elected at-large from the entire city. Candidates for Places 1-8 were required to be residents of the districts which they sought to represent, and were required to remain residents of those districts during their terms of office. Candidates for Places 9-11 were not required to reside in any district. Charter of the City of Dallas, 1931, as amended 1968, ch. IV, sec. 4, 6 (above, at 3); *Lipscomb v. Wise,* 399 F.Supp. 782, 785 (N.D. Tex. 1975) (A. 124).

At-large elections have been used continuously in Dallas since 1907, first under special charter granted by the Texas legislature, and later under the City's home rule Charter. Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596 (A. 124); Charter of the City of Dallas, 1931, ch. III, sec. 9 (A. 188); Charter of the City of Dallas, 1931, as amended 1968, ch. IV, sec. 4 (above, at 3). *Lipscomb v. Wise,* supra, 399 F.Supp. at 785 (A. 124).

Negro and Mexican-American voters filed suit in the United States District Court for the Northern District of Texas, seeking a determination that the at-large election of all city council members denied them equal protection. Jurisdiction of the district court was based upon 28 U.S.C. Section 1343 (3), (4).

The Mexican-American plaintiffs were dismissed from the suit (A. 122), and the district court rendered judgment that the at-large election of all members of the council unconstitutionally diluted the voting strength of Negro voters. The district court then "gave the City of Dallas an opportunity to perform its duty to enact a constitutionally acceptable plan", *Lipscomb v. Wise,* supra, 399 F.Supp. at 785 (A. 136), and retained jurisdiction pending the adoption of a plan by the City (A. 123).

The city council reapportioned itself, adopting a plan which maintains Places 9, 10 and 11 in their previous form, elected at-large, and without regard to residency within any district of the city. Places 1-8 were converted into single-member districts. *Lipscomb v. Wise,* 551 F.2d 1043, 1045-1046 (5th Cir. 1977) (A. 170); *Lipscomb v. Wise,* supra, 399 F.Supp. at 792 (A. 135); City of Dallas Resolution 75-0207, sec. 1 (A. 188); City of Dallas Ordinance No. 14800, sec. 2 (A. 189).

The plan adopted by the council was reviewed and found constitutional by the district court. *Lipscomb v. Wise,* supra, 399 F.Supp., at 792 (A. 136).

The district court found that the combination of single-member and at-large positions would afford Mexican-Americans a "greater opportunity for participating in the political process." *Lipscomb v. Wise,* supra, 399 F.Supp., at 792 (A. 140).

The district court further found that the "need for a city-wide view on the part of the council" also forms a valid basis for partial at-large representation, citing the advantages of having a non-sectional viewpoint expressed in zoning matters, city planning and the budget. *Lipscomb v. Wise,* supra, 399 F.Supp., at 794 (A. 141).

The Court of Appeals for the Fifth Circuit reversed and

remanded, citing this Court's decision in *East Carroll Parish School Bd. v. Marshall,* 424 U.S. 636 (1976), holding that there was no "special circumstance" which would permit the at-large election of three of the eight council members, and prohibiting the at-large election of any council member other than the mayor. *Lipscomb v. Wise,* supra, 551 F.2d, at 1048 (A. 173). The court of appeals did not purport to determine the constitutionality of the plan enacted by the city council.

All parties petitioned for rehearing, and the court of appeals denied those petitions July 13, 1977 (A. 178).

The court of appeals denied petitioners' motion for stay of the mandate of that court (A. 180).

The mandate of the court of appeals was recalled and the judgment of that court stayed by order of Mr. Justice Powell, dated August 30, 1977 (A. 181).

The petition for writ of certiorari was granted January 9, 1978.

SUMMARY OF ARGUMENT

1. This Court has established a standard of review for reapportionment plans initiated by State agencies, and has established a different, and more restrictive, standard of review for reapportionment plans devised and ordered by federal courts in the wake of a State's failure to adopt a constitutionally acceptable reapportionment. The court of appeals has confused those standards, and has erroneously subjected the City's reapportionment plan to the more stringent standards applicable only to a plan initiated by federal court.

2. This Court has not held that the use of racial criteria is limited to the elimination of past discrimination, and the decision of the court of appeals in so holding appears to be contrary to decisions of this Court.

3. The validity of at-large voting based upon the need for a community-wide perspective has been recognized by this Court. The court of appeals has disregarded those decisions, and has disregarded the district court's pertinent fact findings without expressly holding them clearly erroneous.

ARGUMENT

1. The court of appeals has erred by limiting, beyond the requirements of the Equal Protection Clause, a home rule city's freedom to devise a substitute for an apportionment plan found unconstitutional.

The City's reapportionment plan retains the use of at-large voting in the election of three of its eleven members. The district court held City's plan constitutional and approved its implementation. The court of appeals ruled that this Court's decision in *East Carroll Parish School Board v. Marshall,* 424 U.S. 636 (1976) requires the exclusive use of single-member districts in the absence of special circumstances and, finding no evidence of special circumstances, reversed. The City contends that its plan is subject to review only on constitutional grounds, and that evidence of special circumstances is not required to justify the partial use of at-large voting.

Apportionment of State legislative bodies is an essentially political process of the sovereign States, *Gaffney v. Cummings,* 412 U.S. 735, 754 (1973), dealing with fundamental choices about the nature of representation. Id., 412 U.S., at 749. That process is one which is intended to have substantial political consequences, Id., 412 U.S., at 753, the very essence of which is to produce a politically fair result rather than one based simply on population. It is a process in which those who reapportion seek, "through compromise or otherwise, to achieve the political or other ends of the State, its constituents, and its office holders." Id., 412 U.S., at 753-754.

The courts have disclaimed any distinctive mandate to compromise conflicting State apportionment policies in the people's name, and have acknowledged that they lack the political authoritativeness which legislative bodies can bring to the apportionment task. *Conner v. Finch,* ____U.S.____, 52 L.Ed.2d 465, 474 (1977).

Reapportionment therefore is primarily the responsibility of the State through its legislature or other agency chosen by the State to perform that function. See *Chapman v. Meier,* supra, 420 U.S., at 27; *Gaffney v. Cummings,* supra, 412 U.S., at 751. Cf. *White v. Weiser,* 412 U.S. 783, 795 (1973), and cases there cited.

When a legislative apportionment plan is held unconstitutional the State should be given an opportunity to devise its own reapportionment plan to eliminate constitutional deficiencies. *Reynolds v. Sims,* 377 U.S. 533, 586 (1964), *Burns v. Richardson,* 384 U.S. 73, 85 (1966). See also *Gaffney v. Cummings,* 412 U.S. 735, 750-751 (1973) and *Dusch v. Davis,* 387 U.S. 112, 114 (1967). If the State timely adopts a remedial apportionment plan, it is subject to review only to the extent that it must meet the "clear commands of the Equal Protection Clause." *Burns v. Richardson,* supra, 384 U.S., at 85, cf. *Dusch v. Davis,* supra, 387 U.S., at 117. If the State fails to adopt its own remedial plan within a reasonable time, or if its plan violates the Equal Protection Clause, the district court is authorized to devise and order implementation of a plan. *Whitcomb v. Chavis,* 403 U.S. 124, 162 (1971). Such court-ordered reapportionment plans must not only satisfy the requirements of the Equal Protection Clause but must also conform to the federal common law of voting rights remedies, which forbids the court-initiated use of at-large voting except under unusual circumstances. *East Carroll Parish School Board v. Marshall,* 424 U.S. 636, 639-640 (1976). This Court has

never held that State-initiated reapportionment plans are subject to the closer scrutiny by which court-ordered plans must be tested, but instead has declared that the standards for evaluating the use of at-large voting in remedial apportionment plans differ depending on whether the use of at-large voting is initiated by a federal court or by a State agency. *Chapman v. Meier,* 420 U.S. 1, 18 (1975). See also *Connor v. Finch,* ____U.S.____, 97 S.Ct. 1828, 1833 (1977).

The Court of Appeals for the Fifth Circuit in this case recognized that the use of at-large voting stems from "Dallas' longstanding public policy in favor of at-large voting." *Lipscomb v. Wise,* supra, 551 F.2d at 1046 (A. 172). See also Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596 (A. 188); Charter of the City of Dallas, 1931, ch. III, sec. 9 (A. 188); Charter of the City of Dallas, 1931, as amended 1968, ch. IV, sec. 4 (above, at 3). Cf. *Kilgarlin v. Hill,* 386 U.S. 120, 123-124 (1967). The court of appeals also found that the plan approved by the district court was "enacted as a city ordinance following the [district] court's decision that the prior system was unconstitutional." *Lipscomb v Wise,* supra, 551 F.2d, at 1045 (A. 170). The court of appeals nevertheless stated that the council's reapportionment plan could be approved only if "the election plan proposed and formally adopted by the city council is (1) constitutional and (2) otherwise in accordance with the federal common law of voting rights remedies". *Lipscomb v. Wise,* supra, 551 F.2d, at 1046 (A. 171). The court of appeals did not purport to determine the constitutionality of the City's reapportionment plan, but held the plan contrary to federal common law and therefore invalid because there appeared to be no special circumstances to justify at-large voting. *Lipscomb v. Wise,* supra, 551 F.2d, at 1048 (A. 173).

The use of at-large voting in the City of Dallas was not initiated or imposed upon the City by a federal court, as in *Chapman v.*

Meier, supra, 420 U.S. at 18, 19, but instead was initiated by the Texas legislature more than sixty years before this litigation began. Charter of the City of Dallas, Tex. Laws 1907, ch. 71, art. III, sec. 1, at 596 (A. 188). *Lipscomb v. Wise,* supra, 399 F.Supp., at 785 (A. 147). The use of at-large elections was continued by the City upon its adoption of a home-rule charter in 1931, Charter of the City of Dallas, 1931 (A. 188), and has been in effect without interruption since 1907. Tex.Laws 1907, ch. 71, art. III, sec. 1 (A. 188); Charter of the City of Dallas, 1931, (A. 188); Charter of the City of Dallas, 1931, as amended 1973 (A. 188); Charter of the City of Dallas, 1931, as amended 1976 (above, at 5). The plan itself was not devised by the district court, but was created as a legislative act of the City Council of the City of Dallas.[1]

[1] In Texas a home rule city such as the City of Dallas derives its power not from the Legislature, but from the Home Rule Amendment, Article XI, Section 5 of the Texas Constitution, adopted in 1912. *Lower Colorado River Authority v. City of San Marcos,* 523 S.W. 2d 641, 642 (Tex.Sup.Ct. 1975). Home rule cities in Texas have been held since that time to have "full power of self-government, that is, full authority to do anything the Legislature could theretofore have authorized them to do. The result is that now it is necessary to look to the acts of the Legislature not for grants of power to such cities but only for limitations on their powers." *Forwood v. City of Taylor,* 147 Tex. 161, 214 S.W.2d 282, 286 (Tex.Sup.Ct. 1948).

Chapter II, sec. 2 of the Charter of the City of Dallas provides that: "The enumeration of particular powers in the charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated therein, implied thereby or appropriate to the exercise thereof, the city shall have and may exercise all other powers which under the Constitution and laws of the State of Texas, it would be competent for the charter specifically to enumerate. The city shall have and exercise all the powers conferred upon cities by what is known as the Home Rule Amendment to the Constitution of the State of Texas and the Enabling Act relative thereto, passed by the Thirty-Third Legislature of the State of Texas, found in the published laws of said legislature, Regular Session, pages 307 to 317 and effective July 7, 1913, and all other laws passed by the legislature of the State of Texas, relating thereto, or which may hereafter be passed by said legislature in relation to such matters."

Chapter XXIV, sec. 16 of the Charter of the City of Dallas provides that: "The enumeration of powers made in this charter shall never be construed to preclude, by implication or otherwise, the city from exercising the powers incident to the judgment of local self-government, nor to do any and all things not inhibited by the Constitution and laws of the State of Texas."

The City's present apportionment plan was devised and adopted by the governing body of a State political subdivision. The use of at-large representation as one aspect of that plan is a device which is state-initiated, having first been used in Dallas at the direction of the Texas legislature, more than seventy years ago. At-large voting was adopted by the City in its first home rule charter, has been used without interruption, and continues to be used by the City.

The use of at-large voting by the City of Dallas clearly is "state-initiated" within the meaning of *Chapman v. Meier,* supra, 420 U.S. at 18, and qualifies as "established State policy" entitled to judicial respect and deference. Id., 420 U.S., at 14, 19. The reapportionment plan enacted by the city council is not a court-ordered reapportionment scheme reviewable under the "special circumstances" test applied by the court of appeals, see *Chapman v. Meier,* supra, 420 U.S., at 15, 18-19, and the plan is reviewable only to the extent that it must conform to the "clear commands of the Equal Protection Clause." *Burns v. Richardson,* supra, 384 U.S., at 85; cf. *Dusch v. Davis,* supra, 387 U.S., at 117. Neither the court of appeals nor the district court has held that the City's use of at-large voting violates the Equal Protection Clause, and the court of appeals erred in reversing the judgment of the district court.

2. The court of appeals has held, contrary to decisions of this Court, that the effect of the City's reapportionment plan on Mexican-American voters have been unconstitutionally impaired.

(1) Chapter XVIII, sec. 1 of the Charter of the City of Dallas provides that: "The city council shall evidence its official actions by written ordinances, resolutions or oral motion. The use of one method or the other shall not affect the validity of the action, except in those instances where one or the other is required by state law or this charter."

There is no provision under Texas law for reapportionment of home rule cities by the State legislature or other State-wide agency.

The record suggests no statutory or constitutional limitation of the authority of the City of Dallas to adopt a municipal election plan, either by resolution, by ordinance or by charter amendment, subsequent to the judicial invalidation of the prior charter provision.

The district court found the city council's reapportionment plan constitutional, declared that Mexican-Americans in Dallas "do not suffer from present dilution of their voting strength", *Lipscomb v. Wise,* supra, 399 F.Supp., at 793 (A. 139), and made extensive findings of fact which support its conclusion that the incorporation of some at-large voting into the plan would enhance the opportunity of Mexican-American voters to participate in local electoral politics. The district court found that "here we deal with two separate minority groups, each with a significant interest. This interplay of distinct minority interests is markedly similar to the 'singular combination of unique factors' which justified a multi-member apportionment plan in *Mahan v. Howell,* 410 U.S. 315, 333 (1973)." *Lipscomb v. Wise,* supra, 399 F.Supp., at 793-794 (A. 141).

The court of appeals applied the "special circumstances" rule of *East Carroll Parish School Board v. Marshall,* supra, 424 U.S. 636, and held that the interests of Mexican-American voters did not amount to a "special circumstance" because the district court had not found any unconstitutional impairment of Mexican-American voting rights. *Lipscomb v. Wise,* supra, 551 F.2d, at 1047 (A. 174).

The City contends that the special circumstances rule of *East Carroll* is not applicable to its reapportionment plan, for the reasons stated under part I, above, at 9-13. If *East Carroll* is applicable, the City contends that the constitutionality of the former system with respect to Mexican-Americans is irrelevant to a determination of special circumstances.

This Court recently upheld a reapportionment based upon racial criteria even though that reapportionment was not devised as a remedy for past unconstitutional apportionments, with three members of the Court expressing the view that the use of racial criteria is not confined to eliminating the effects of past

discriminatory districting or apportionment. *United Jewish Organizations v. Carey,* ___ U.S. ___, 97 S.Ct. 996, 1007, 51 L.Ed.2d 229, 243 (1977). The Court also has said, in *Gaffney v. Cummings,* supra, 412 U.S., at 752-754, ". . . neither we nor the district courts have a constitutional warrant to invalidate a State plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the state." Id., 412 U.S., at 754.

The conclusion of the court of appeals, that the voting rights of Mexican-Americans cannot be considered absent a finding of unconstitutional dilution, appears to be contrary to this Court's decision in *United Jewish Organizations v. Carey,* supra, and no decision is found which expressly supports the decision of the court of appeals.

The City further contends that multi-member districts and at-large elections do not, per se, violate the Equal Protection Clause, *Whitcomb v. Chavis,* supra, 403 U.S., at 142 (1971), and that the incorporation of at-large voting in a State-initiated remedial apportionment plan does not violate the "clear commands of the Equal Protection Clause" unless the reapportionment plan, as a whole, invidiously cancels out or minimizes the voting strength of racial groups. *White v. Regester,* 412 U.S. 755, 765-766 (1973). A successful equal protection challenge moreover must be based on findings in a particular case that a plan in fact operates to dilute the voting strength of an identifiable element of the voting population. *Dallas County v. Reese,* 421 U.S. 477, 480 (1975), *Whitcomb v. Chavis,* supra, 403 U.S., at 144.

There is no finding in this case that the partial use of at-large voting dilutes the voting strength of any identifiable element of

the voting population. The district court found exactly the opposite. The court of appeals has improperly relied on a theoretical presumption rather than a factual conclusion. *Dallas County v. Reese,* supra, 421 U.S., at 480-481.

This Court has not held that the use of at-large voting to further the voting rights of any group must be predicated upon a finding of an unconstitutional dilution of that group's voting strength. This Court has not held that special circumstances justifying the use of at-large voting must be predicated upon a finding of prior unconstitutional apportionment; the court of appeals has erred in so holding, and its decision should be reversed.

3. The court of appeals has invalidated the City's use of at-large voting based upon the need for representation of a city-wide perspective in municipal government, even though neither the district court nor the court of appeals found that such use of at-large voting would minimize or cancel out the voting strength of any identifiable segment of the voting population.

The district court found that the city council's constitutionally permissible preference for partial at-large representation was based on the council's responsibility for policies which affect the city as a whole, as well as those which affect geographic or demographic segments of the city, and that a non-sectional viewpoint is desirable in matters such as zoning, formulation of the budget and urban land use planning. *Lipscomb v. Wise,* supra, 399 F.Supp., at 794 (A. 141). The district court also found that the plaintiffs had admitted the need for at least one at-large member of the council, and that the issue of city-wide representation was merely a question of degree. *Lipscomb v. Wise,* supra, 399 F.Supp., at 794-795 (A.141-142).

The court of appeals disregarded those findings and did not

purport to determine the validity of the City's interest in representation of a city-wide perspective on the council. The court of appeals nevertheless declared the council's plan invalid, although there are no findings of fact on which to base that determination. See *Dallas County v. Reese,* supra, 421 U.S., at 480.

The City contends that the special circumstances rule of *East Carroll* is not applicable to its reapportionment plan, for the reasons stated under part 1, above, at 9-13. If *East Carroll* is applicable, the City contends that the public interest in city-wide representation, as found by the district court, constitutes a valid special circumstance justifying some at-large representation.

This Court has approved local government apportionment plans which utilize at-large representation, *Dusch v. Davis,* 387 U.S. 112 (1967), cf. *Dallas County v. Reese,* supra, and *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965), and has indicated that representation of city-wide views may form a rational basis for the use of multi-member districts. *Chapman v. Meier,* supra, 420 U.S., at 20 n. 14; *Dallas County v. Reese,* supra, 421 U.S., at 479-780; *Dusch v. Davis,* supra, 387 U.S., at 116-117; *Fortson v. Dorsey,* supra, 379 U.S., at 438.

In this case the findings of the district court fully sustain the use of some at-large voting, and the court of appeals has not declared those findings clearly erroneous. There are no findings to support a conclusion that the partial use of at-large voting dilutes, minimizes or cancels out the votes of any minority group, and the court of appeals has erred in holding the City's plan unlawful.

CONCLUSION

Petitioners pray that the judgment of the court of appeals be reversed and that the judgment of the district court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing brief were served by mail on James A. Johnston, Esq., Sylvia M. Demarest, Esq., Edw. B. Cloutman, Esq., Walter L. Irvin, Esq. and George Solares, Esq., Attorneys for Respondents, on the ____ day of February, 1978.

.....

FOR ARGUMENT

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, ET AL.,

Petitioners,

v.

ALBERT L. LIPSCOMB, ET AL.,

Respondents.

BRIEF FOR THE RESPONDENTS

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ALBERT L. LIPSCOMB, ET AL.,

Respondents.

RESPONDENTS' BRIEF ON THE MERITS

TO THE HONORABLE JUDGES OF SAID COURT:

Respondents respectfully submit the following brief on the merits.

STATUTES, CHARTER, ORDINANCES AND RESOLUTIONS INVOLVED

In addition to the statutes, charter, ordinances and resolutions provided by petitioners, respondents would include the following:

Art. 1170, Tex. Civ. Stat. Ann. (1973)

When the governing body desires to submit amendments to any existing charter, said body may on its own motion, in the absence of a petition, and shall, upon receiving a petition signed by qualified voters in such city, town or political subdivision in number of not less than five per cent (5%) thereof or 20,000 signatures, whichever is less, submit any proposed amendment or amendments to such charter. The ordinance providing for the submission of such amendment or amendments shall require the submission thereof at an election to be held not less than thirty (30) days nor more than ninety (90) days after the passage of said ordinance. If the next regular municipal election is to be held during said period, the submission of said amendment or amendments shall be at such election. Otherwise, a special election shall be called for the purpose. Notice of the election for the submission of said amendment or amendments shall be given by publication thereof, in some newspaper of general circulation published in said city, on the same day in each of two (2) successive weeks; the date of the first publication to be not less than fourteen (14) days prior to the date set for said election. The form of such notice shall be as prescribed by the governing body or as may be otherwise prescribed by law, and shall include a substantial copy of the proposed amendment or amendments. Every amendment submitted must contain only one subject, and in preparing the ballot for such amendment, it shall be done in such manner that the voter may vote "Yes" or "No" on any amendment or amendments without voting "Yes" or "No" on all of said amendments. Each such proposed amendment, if approved by the majority of the qualified voters voting at said election, shall become a part of the charter of said city. No amendment shall be considered adopted

until an official order has been entered upon the records of said city by the governing body thereof declaring the same adopted.

STATEMENT OF THE CASE

The District Court found for respondents on the merits of their cause of action, holding that requiring all members of the City Council to run at-large unconstitutionally diluted the voting rights of the black citizens of the City of Dallas. The petitioners did not challenge this holding in the Court of Appeals and do not challenge it before this Court. At issue here is the selection of the appropriate remedy. (A. 170).

Respondents dispute the contention of petitioners that subsequent to the finding of the District Court that the existing at-large election system was unconstitutional that the City Council reapportioned itself, adopting the eight single-member, three at-large (eight/three) election system now challenged.

On January 17, 1977, after the lengthy hearing during which the petitioners vigorously defended the existing at-large election system, the District Court announced that it found such system unconstitutional and ordered the City Council to present a constitutional plan for the Court's consideration, permitting respondents to also offer proposed remedies. (A. 123). On January 23, 1975, the attorney for petitioners, pursuant to their instructions, submitted to the District Court a resolution stating the intention of a majority of the City Council to pass an ordinance to adopt the eight single-member, three at-large election system. Hearings were had on this plan presented

to the Court by the City Council, as well as two plans submitted by respondents. The two plans presented by respondents unquestionably provide greater representation for black voters than did the eight/three plan submitted by the petitioners. (R. Px. 108-111). At the conclusion of these hearings, the District Court ordered the plan implemented. Only then did the Council pass an ordinance purporting to change the election system. That ordinance begins with the assertion that it was passed "[a]s a result of the decision of the United States District Court for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA3-4571-E, and this ordinance enacted pursuant thereto..." (A. 189).

In fact, the City Council has no authority to change the election system. The election system is mandated by the Charter of the City of Dallas. (A. 150, 151). Amendments to the charter may be made only by a majority of the qualified voters voting at an election held for that purpose. Art. 1170, TEX. CIV. STAT. ANN. (1973). As the District Court itself held, "[i]f defendants had attempted to unilaterally change the voting plan, absent a vote of the people *or a ruling from the Court* with proper jurisdiction that a provision of the Dallas City Charter was constitutionally unfirm, they would have been acting unlawfully." (A. 151). (Emphasis supplied).

In the month of April, 1976, while this cause was on appeal to the Court of Appeals, the electorate approved a charter amendment adopting the disputed eight/three plan. This charter amendment was not submitted to the Attorney General for preclearance, nor was a declaratory judgment sought in the United States District Court for the District of Columbia, pursuant to the requirements of the voting Rights Act of 1965, as amended. 42 U.S.C. §1973(c).

Petitioners further neglect to mention that certain Mexican-American residents of the City of Dallas sought to intervene, alleging that Mexican-Americans as a class were denied effective participating in the political system of the City of Dallas because of the at-large election system. (A. 21-25). Because of immediacy of hearings on liability, this intervention was denied as to the hearing on the merits, although the District Court did permit the intervenors to participate in any hearing on remedy. (A. 26-28).

After the District Court ordered the eight/three plan and used the Mexican-American citizen as a special circumstance to justify the at-large features, the Mexican-American intervenors filed their Motion for Further Relief stating that the just concluded election in which the Mexican-American incumbent councilman was defeated by an incumbent Anglo councilman at-large contest demonstrated that at-large voting dilutes the vote of the Mexican-American citizen. The Court denied further relief. (A. 164-165).

The City Council did not appeal the District Court's finding that the old at-large election system was unconstitutional. Plaintiffs and intervenors, the Mexican-Americans, appealed, challenging the eight/three remedy ordered by the District Court. The Court of Appeals for the Fifth Circuit reversed and remanded the decision of the District Court, holding that the particular situation of Mexican-American citizens in Dallas did not constitute a special circumstance within the contemplation of *East Parish School Board v. Marshall*, 424 U.S. 636 (1976). (A. 168-177).

SUMMARY OF THE ARGUMENT

1. The District Court is bound by the rule of *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976) requiring single-member districts absent unusual circumstances when a court orders reapportionment of an election system.

2. Mexican-American voters in this case cannot provide a justification for at-large seats. The District Court's finding that they would benefit from at-large elections is clearly erroneous.

3. The District Court's perceived need for a city-wide perspective on the City Council cannot justify the use of the at-large election system.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY HELD THAT THE AT-LARGE ASPECTS OF THE ELECTION PLAN ORDERED BY THE DISTRICT COURT VIOLATED THE FEDERAL COMMON LAW PREFERENCE FOR SINGLE-MEMBER DISTRICTS.

Respondents agree with the Court of Appeals that this dispute must be settled within the parameters of the rule last stated in *East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1976):

> We have frequently reaffirmed the rule that when United States District Courts are put to the task of fashioning reapportionment plans to supplant concededly invalid State legislation, single-member districts are to be preferred absent unusual circumstances. 424 U.S. at 639.

The petitioners contend the rule is not applicable, because the instant plan is "State-initiated," not court-ordered, and is therefore not subject to the federal common law of voting rights remedies. The threshold question becomes whether or not this is a court-ordered plan within the ambit of *East Carroll.*

Respondents have set forth in their Statement of the Case a chronology of the steps taken by the District Court in ordering the eight/three plan implemented. That the District Court ordered that elections be held pursuant to the eight/three plan cannot be denied (A. 147, 150). The City Council ordinance itself recites that it was passed as a result of the decision of the District Court.

Also revealing is that while this cause was pending before the Court of Appeals, a Charter amendment election was held formally adopting the eight/three plan. This election change was not submitted to the Attorney General for preclearance, nor was a declaratory judgment sought in the United States District Court for the District of Columbia, as would be required by law if this were a state-instituted plan. 42 U.S.C. 1973(c).

The only reasonable explanation for the City not to have submitted the plan to the Attorney General or sought declaratory relief is that petitioners believed that they were exempted from compliance with the Voting Rights Act because the Charter election was merely compliance with the decree of the District Court establishing the eight/three

election system. See *Connor v. Johnson*, 402 U.S. 690 (1971). Indeed, *East Carroll Parish School Board v. Marshall, supra*, makes clear that the preclearance procedures of § 5 of the Voting Rights Act do not apply to a reapportionment scheme submitted and adopted pursuant to court order. 424 U.S. 636, 638 n.6.

Thus a review of the facts reveal that this was not a state-initiated plan but rather one directed and ordered by a District Court exercising its equitable jurisdiction in an adversary proceeding. *East Carroll Parish School Board v. Marshall, supra.*

Petitioners argue, however, that this Court has on several occasions held that when an apportionment plan is held unconstitutional that the legislative body should be given an opportunity to devise a remedy, citing *Reynolds v. Sims*, 377 U.S. 533 at 586 (1964); *Burns v. Richardson*, 384 U.S. 73 at 85 (1966). Respondents insist, however, that reliance on this line of cases is inappropriate.

First, unlike the instant case, none of these cases involve a trial court holding that multi-member districts had unconstitutionally diluted the voting strength of a racial minority. Rather, these cases arose in the context of one man, one vote challenges to the apportionment of a political entity. To the extent that these cases are concerned with multi-member districts at all, it is usually in the context of fashioning an immediate, temporary remedy to avoid election confusion. See *Burns v. Richardson, supra.* Again, multi-member districts have been permitted as a remedy, but only with the stern warning from this Court that they may not be used if they invidiously discriminate against racial minorities. *Burns v. Richardson*, id. at 88.

This Court in *White v. Register*, 412 U.S. 755 (1973) upheld the invalidation of multi-member districts in Dallas

County legislative races and established the evidentiary standards by which invidious discrimination minimizing the voting strength to racial minorities may be ascertained. Significantly, the remedy implemented had no at-large features, and is most recently exemplified by the Tarrant County, Texas portion of said litigation, Supreme Court Docket No. 77-1033, decided February 27, 1978, rehearing denied March 17, 1978. This last order adopted a single-member district remedy proffered by the plaintiffs, even though a state proposed remedy was also before the District Court.

It is certainly reasonable that the federal courts would seek to avoid the political thicket created when called upon to draw district boundary lines for election plans. An excellent discussion of the political implications of reapportionment is found in *Gaffney v. Cummings*, 412 U.S. 735 (1973), which involved what is a good example of a "State-initiated" plan, i.e. a plan created independent of any court order. But even in such a case, this Court felt constrained to warn that there were limits to this exercise of political power, mentioning specifically the vulnerability of multi-member districts if "racial" groups have been fenced out of the political process and their voting strength invidiously minimized." *Gaffney v. Cummings, supra*, 754.

When the District Court afforded the City Council an opportunity to devise a proper election scheme, the Council took it upon itself to go far beyond drawing boundary lines which would, for example, preserve the integrity of political subdivision lines. Rather, in the face of the finding that at-large elections diluted minority voting strength, they presented to the District Court a plan that preserved elements of the very election system that had been found

constitutionally infirm. The City Council is thus seeking to preserve a system already found to be discriminative.

Second, *Reynolds v. Sims, supra*; *Burns v. Richardson, supra*; and *Gaffney v. Cummings, supra*, are cases involving state legislatures which, unlike the City Council, have the unquestioned power to reapportion themselves. As have already been shown, the Charter of the City of Dallas commands the form and procedures of the election of members to the City Council. The Charter may not be amended by an ordinance or resolution passed by the City Council. It can be amended only by a majority vote of the citizens of the City. Art. 1170, TEX. REV. CIV. STAT. ANN.

That what this Court has before it is a court-ordered plan is best shown by comparison with recent cases which concededly involve court-ordered plans.

In *East Carroll Parish School Board v. Marshall, supra*, a white resident of the parish challenged the population disparities between the various wards of the parish. After a hearing, the trial court agreed, and, at the recommendation of the East Carroll police jury (the legislative body of the parish and a defendant) adopted an election plan calling for the at-large election of members of the police jury and the school board. Supra, at 637. Subsequently, after the 1970 census data became available, the District Court instructed the police jury and the school board to file new reapportionment plans. They did so, submitting the at-large plan, *supra.* At this point, Marshall, a black citizen of the parish, was permitted to intervene. Marshall asserted that at-large elections unconstitutionally diluted black voting strength and the Voting Rights Act of 1965. Following a hearing, the District Court approved the

at-large voting arrangement. A panel of the Court of Appeals affirmed, but on rehearing en banc the court reversed, finding the District Court's ruling of no dilution of black voting strength to be clearly erroneous, and requiring single-member districts. This Court granted certiorari and affirmed the judgment of the Court of Appeals, reaffirming the federal common law preference for single-member districts. Clearly, this Court did not consider the at-large plan submitted by the parish police jury and which had been in effect for several elections to be a "State-initiated" plan which exempts the District Court from its duty to order single-member districts to supplant the unconstitutional at-large scheme.

Justice Powell, in granting petitioners' application for stay of the Court of Appeal's judgment and recall of its mandate, cites *East Carroll Parish* as an example of a *court-ordered* plan, as opposed to a *court approved* plan. *Wise v. Lipscomb*, ____ U.S. ____, 54 L.Ed.2d 41, 45, n.2 (1977). In fact, in *East Carroll Parish* the Court uses these terms interchangeably, referring to the multi-member plan "approved" (424 U.S. at 638) and "adopted" (id. at 638, m.6) by the District Court, and describing the action of the District Court as approved (id. at 638, n.4), "adopting" (id. at 639), and "endorsing." (id.) the at-large plan. Regardless of the labels applied, the real issue is whether the plan originated in the course of a constitutional challenge to an existing election system or the plan originated in regular course of business in the appropriate legislative body.

A similar expression of the Court's application of the federal law of voting rights can be seen in the history of *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975), vacated and remanded, 425 U.S. 947 (1976), on remand, 538 F.2d

1138 (5th Cir. 1976), cert. den'd, ___ U.S. ___, ___ L.Ed.2d ___ (1977) 45 U.S.L.W. 3808 (1977). In that case, the trial court determined that an at-large aldermanic election scheme in the City of Ferriday, Louisiana, unconstitutionally diluted the votes of the black citizens of the town. The District Court invited the Board of Aldermen and the plaintiffs to present plans for the Court's consideration. The District Court rejected the Board's plan because it contained a single at-large seat and adopted the plaintiff's plan, which called for all single-member districts. *Wallace v. House*, 515 F.2d 619, at 622. The Court of Appeals reversed, relying on the language in *Reynolds v. Sims*, 377 U.S. 533 at 586 (1964), that legislative apportionment is a matter for legislative determination, and the legislature must be given an opportunity to fashion a remedy. This Court granted certiorari and remanded the case in light of *East Carroll Parish School Board v. Marshall, supra.* On remand, the Court of Appeals found that no special circumstances were present in the record justifying any deviation from the rule of *East Carroll* and affirmed the District Court's all single-member district plan.

By contrast, the parameters of a "state initiated" plan are exemplified by this Court's decision in *Connor v. Waller*, 421 U.S. 656 (1975) requiring a state enacted reapportionment scheme to be submitted for preclearance under §5 of the Voting Rights Act of 1965. In this decision, the governmental body without court order or direction, pursuant to its authority, attempted to legislate an election plan for the State of Mississippi. This Court treated such election scheme as "state initiated," ruling same to be covered by the aforementioned preclearance procedures. As noted

earlier, the decision in *East Carroll* Parish excludes from such submission requirements election plans ordered, adopted, endorsed or approved by courts in the course of litigation.

Surely the instant cause falls squarely within the framework of a court-ordered plan — a plan initiated and ordered by a court exercising its equitable jurisdiction in an adversary proceeding.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT MEXICAN-AMERICANS DID NOT CREATE AN "UNUSUAL CIRCUMSTANCE" SUFFICIENT TO JUSTIFY THE EIGHT/THREE PLAN.

The District Court was aware that in ordering a plan it was abound by the "unusual circumstance" test set forth in *Connor v. Johnson, supra.* (A. 146). The District Court decided that the Mexican-American population could provide the "unusual circumstance" which would justify the three at-large seats. The District Court apparently believed that three at-large seats would provide more electorial access for Mexican-American voters than would single-member districts. Respondents agree with the Court of Appeals that the District Court abused its discretion in making such a finding.

Factually, Mexican-Americans amount to no more than 10 percent of the population of the City. (A. 138). No single-member district could be considered "safe" for a Mexican-

American candidate unless at least twenty districts were created, a suggestion the District Court found "completely void of merit." (A. 137). Although Mexican-Americans were not permitted to intervene during the trial on the merits, the District Court concluded that they "had suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution." (A. 138). The District Court concluded that 1) Mexican-American access would not be improved by exclusive single-member district voting, and 2) Mexican-Americans could work with the dominate slating group to operate in a "swing-vote" manner. For these reasons the District Court held that single-member districts would not increase Mexican-American participation, and that the at-large aspects of the eight/three plan would benefit the Mexican-Americans.

The District Court chose to ignore the testimony of the one Mexican-American who had had experience as a candidate in the context of both at-large and single-member elections — Robert Medrano. Mr. Medrano testified that he had run twice at-large for the Trustee of the Dallas Independent School District. Each time he was defeated. (A. 84). In 1974 he again ran for Trustee, but this time from a newly-created single-member district. The district from which he ran was twenty-one percent Mexican-American and thirty percent black. Mr. Medrano won that election in a run-off with a white opponent. He was not endorsed by any slating group. (A. 85). Obviously this evidence contradicts the District Court's conclusions. In fact, there is no credible evidence in the record that Mexican-American access would not be improved by exclusive single-member district voting.

In April, 1975, the first election under the eight/three plan was held. In a direct test of the District Court's theory of the

Mexican-American's position in the electorial politics of the City of Dallas, the Mexican-American incumbent councilman, Pedro Aguirre, ran against Gary Weber, an Anglo, for one of the three at-large positions. Aguirre was endorsed by the Citizens Charter Association, the powerful and successful slating group. (See A. 126-127). Aguirre was defeated by a substantial majority. (A. 154). Indeed, since the institution of the eight/three plan, no Mexican-American has held a position on the City Council.

Further, as the Court of Appeals pointed out, the Mexican-American intervenors disclaimed the notion that at-large voting allowed greater participation by Mexican-Americans, but rather, citing the defeat of Pedro Aguirre, pointed out that the at-large feature made it "impossible for a Mexican-American to participate meaningfully in the election process." (A. 165).

This Court has found very limited those circumstances which would support the ordering of multi-member districts. In *Mahan v. Howell,* 410 U.S. 315 (1973), this Court was faced with such special circumstance. There, the Virginia General Assembly constructed three single-members districts. However, 36,700 naval personnel "home-ported" at the local naval station situated in that area were arbitrarily assigned to one district, even though it was undisputed that only 8,100 of these personnel actually live aboard vessels located in this district. The rest lived in the surrounding area encompassed by all three districts, although census data was at that time unavailable to show where they lived. It was therefore impossible to draw three single-member districts that were equal in population. Faced with these "unusual, if not unique" circumstances, and confronted with the fact that a delay would seriously disrupt the regularly scheduled

election, this Court found that the District Court did not abuse its discretion in fashioning an interim remedy of combining the three districts into one multi-member district. This Court did, however, repeatedly comment that this case involved a "singular combination of unique factors." *Mahan v. Howell, supra*, at 333. Obviously, the "unusual circumstances" test is a very demanding legal standard.

Petitioners argue that *United Jewish Organizations v. Carey*, ____ U.S. ____, 51 L.Ed.2d 229 (1977) stands for the proposition that the District Court could consider the needs of a second minority group, i.e. Mexican-Americans, in fashioning a remedy, even if there had been no finding of unconstitutional dilution of that minority group's voting rights. Of course, *United Jewish Organization v. Carey, supra*, arose in context of the state-initiated, single-member district reapportionment plan submitted to the United States Attorney General pursuant to §5 of the Voting Rights Act of 1965. Thus, this Court did not have to concern itself with the "unusual circumstance" test. Moreover, only three members of this Court chose to join in a concurring opinion on this Constitutional point, offering no authority for their contention. The issue now before this Court is clearly of a substantially different kind.

There is, then, no credible evidence that the at-large aspects of the plan ordered by the District Court provides any benefit to the Mexican-American citizens of the City of Dallas. Moreover, given the undeniable ambivalence expressed by the District Court as to the access Mexican-Americans have to the political system, it becomes obvious that Mexican-Americans cannot provide the "unusual circumstance" which would justify the eight/three plan.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT THE NEED FOR A CITY-WIDE PERSPECTIVE CANNOT BE AN UNUSUAL CIRCUMSTANCE JUSTIFYING THE USE OF AN AT-LARGE ELECTION SCHEME.

The District Court attempted to justify the three at-large seats on the additional grounds that there was a need for a city-wide perspective on the City Council. It should be noted that the District Court did not find that the need for city-wide representation was an "unusual circumstance" under *Connor v. Johnson, supra.* The District Court simply held that at-large voting had been "an integral part of Texas local governments" (A. 147) and that having some at-large seats would serve the "legitimate governmental interest" of providing a "city-wide view on those matters which concern the city as a whole." (A. 142).

Such conclusions are contrary to the recent holding of this Court in *Connor v. Finch*, 431 U.S. 407 (1977), where the Court noted that

> . . . the practice of multi-member districting contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electorial minorities and overrepresent electorial minorities. . . , *id.*

This Court, at the same time, discounted the historic preference for a certain election system as an "unusual circumstance," noting that

> [t]he defendants' unalloyed reliance on Mississippi's historic policy against fragmenting counties is unsufficient to overcome the strong preference for single-

> member districting that this Court originally announced in this very case. *Connor v. Johnson,* 402 U.S. 690, 692; *Connor v. Williams,* 404 U.S. 549, 551.

This Court and the Court of Appeals have already addressed this issue in the course of the litigation involving the use of at-large elections in the City of Ferriday, Louisiana. The Court of Appeals initially reversed the District Court, which had ordered a pure single-member plan, and ordered a "mixed" plan containing one at-large seat out of five. Among the reasons cited by the Court of Appeals was that

> . . . at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties. While this theory does not always hold true in practice, . . . We cannot say that the rationale is so tenuous that it can be disregarded.
> *Wallace v. House,* 515 F.2d 619, 633 (5th Cir. 1975).

This Court, after granting certiorari, subsequently vacated and remanded the case to the Court of Appeals for consideration in light of *East Carroll Parish Police Jury v. Marshall, supra.* See *Wallace v. House,* 425 U.S. 947 (1976). On remand, the Court of Appeals conceded that the case presented no "special circumstance" that would override the general preference for single-member districting. *Wallace v. House,* 538 F.2d 1138, 1146 (5th Cir. 1976). Cert. den'd, ____ U.S. ____ , 45 U.S.L.W. 3808 (1977).

It must be pointed out that when the District Court initially found that the challenged at-large election scheme restricted the access of black citizens to the political process, it did so on the basis of lengthy evidence of the discriminatory aspects of life and politics experienced by black citizens in Dallas. The District Court specifically found that black voters tend

to vote for black candidates and white voters for white candidates. This being so, a "city-wide perspective" becomes an euphemism for reserving three seats of the City Council for the use and benefit of white majority. This is surely not the "unusual circumstance" contemplated in *East Carroll Parish Police Jury, supra.*

CONCLUSION

Respondents pray that the judgment of the Court of Appeals be affirmed.

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FOR ARGUMENT.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, et al., *Petitioners,*

v.

ALBERT L. LIPSCOMB, et al., and
ADELFA B. CALLEJO, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-529

WES WISE, et al.,

Petitioners,

v.

ALBERT L. LIPSCOMB, et al., and

ADELFA B. CALLEJO, et al.,

Respondents.

BRIEF FOR RESPONDENTS CALLEJO, et al.

QUESTIONS PRESENTED

1. Did the district court err in accepting petitioners' suggestion for a hybrid plan as a remedy for their unconstitutional at-large election scheme, despite this Court's strong preference for single-member district remedial plans?

2. Was the district court correct in finding such unusual circumstances in this case as to justify implementation of a hybrid plan including three at-large districts?

STATEMENT OF THE CASE

In their briefs, neither the City petitioners nor the black respondents fully discuss the position of Mexican Americans in this litigation and in the political life of Dallas. Because that position is crucial to resolution of questions presented here, respondents Callejo, et al. here supplement the Statement of the Case found in the other parties' briefs.

A. Proceedings Below.

1. This case proceeded to trial on the Second Amended Complaint (A. 5-11), in which several Mexican Americans joined the black petitioners as plaintiffs. The Mexican American plaintiffs were dismissed for failure to comply with discovery, 399 F. Supp. at 784 (A. 122). Trial began on July 15, 1974; the next day, the present Mexican American respondents (hereinafter "intervenors") filed their application to

intervene, 399 F. Supp. at 784 (A. 123). On December 9, 1974, the district court denied intervention, but reserved for intervenors the right to participate in any proceedings to determine relief (A. 26-28). It also certified a class of black residents of Dallas, represented by the black respondents (hereinafter "plaintiffs") (A. 28).

After trial on the merits, the district court on January 17, 1975 made an oral finding that the Dallas at-large system was unconstitutional, in that it impermissibly diluted black voting strength, 399 F. Supp. at 791 (A. 134-35). The court then invited the Dallas City Council, in virtually mandatory terms, to take advantage of "an opportunity to submit to this Court a plan for re-districting which is not in conflict with the Constitution."[1] It formalized its finding and order in an opinion entered March 25, 1975, 399 F. Supp. 782 (A. 121 et seq.).

2. The Mexican American intervenors were permitted a limited partici-

[1]Transcript of Judge's Remarks on Announcing Ruling (January 17, 1975), p. 4; see also id., pp. 22-24; 399 F. Supp. at 791 (A. 135).

pation at the remedy stage. Id. at 791 (A. 135). On January 24, 1975, the City defendants proposed a plan consisting of three at-large seats and eight single-member districts (A. 30). The City plan was not a redistricting ordinance but merely a resolution of intention passed by the City Council on January 20, 1975 (A. 188-89), just three days after the court's oral decision (A. 45, A. 3). Defendants acknowledged that they submitted the plan in direct response to the court's preliminary oral findings of dilution. (A. 44, 45, 61, 135).[2] The black plaintiffs proposed two plans: one provided for eleven single-member districts, with the eleven council members then to elect a mayor; the other for ten single-member districts and one mayor elected at-large, 399 F. Supp. at 691 (A. 136). The district court limited the intervenors' role at the remedy hearing to eliciting "...testimony as to the effect that the city's plan and the

[2]The City Council in directing the city staff to formulate a plan did not instruct the staff to take into account racial or ethnic criteria (A. 29, 60). Thus, a districting plan which provided Mexican Americans greater access to the City Council was not even considered (A. 37-38).

plaintiffs' two plans would have on the Mexican American voting population of Dallas." Id. at 791 (A. 136). Intervenors did not therefore present their own plans. Prior to the hearing, representatives from the Mexican American community had unsuccessfully sought to present other alternatives to the City's proposed districting plan to the City Council (A. 43-44, 63). The Council merely directed them to the federal court.[3]

3. The court in its March 25, 1975 opinion approved the eight-three plan over objections of both plaintiffs and intervenors, 399 F. Supp. 791-98 (A. 135-47). Plaintiffs and intervenors appealed the remedy; defendants did not appeal the finding of unconstitutionality of their original at-large plan. On May 9, 1977, the Court of Appeals reversed and remanded with instructions requiring a single-member district plan such as those proposed by plaintiffs, 551 F.2d 1043 (A. 167-77). Justice Powell stayed that

[3]In a similar fashion, the Council would not afford the black community an opportunity to present their single-member district plans (A. 49).

judgment on August 30, 1977, 54 L.Ed.2d 41 (1977) (A. 181-87). Certiorari was granted on January 9, 1978.

B. At-Large Voting and Mexican Americans.

Mexican Americans comprise approximately 8%-10% of the population of Dallas, according to the 1970 census. Blacks comprise 25%, and the remaining 65% are Anglo. Although they comprise about 35% of Dallas' total population, before institution of this suit racial minorities were locked out of effective participation in the at-large process for electing the City Council. Under the district court's hybrid remedy, black participation remains restricted, while Mexican Americans remain entirely excluded.

The record shows that Mexican Americans in Dallas are a cognizable and victimized minority group. The district court also recognized that discrimination against Mexican Americans had included some degree of restriction of their voting rights, but not so great a degree as to render that restriction an unconstitutional

dilution.[4] The district court's findings with respect to the impact of at-large voting specifically on Mexican Americans are similarly ambivalent, finding some handicaps and some advantages.[5] There is no dispute, however, that racial bloc voting is a political reality in Dallas, and it affects Mexican American candidates, 399 F. Supp. at 793-94 (A. 140), see A. 43. Another harsh reality of at-large campaigning in a city the size of Dallas is its extremely high cost--a serious obstacle for Mexican Americans (A. 75, 67).

Under the at-large election scheme, only two Mexican Americans have ever been elected to the Dallas City Council (A. 110). Both enjoyed the support of Dallas'

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[4] "The Court finds that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution...The restriction of access which is present for Mexican-Americans is of a smiliar nature to that this Court found to exist for the black voters, but it differs..." 399 F. Supp. at 793 (A. 138), see also A. 72-73.

[5] "At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks. At the same time, however, it is clear that at-large voting offers features [continued next page]

most powerful slating group, see 399 F. Supp. at 786-87 (A. 126-28), the Citizens Charter Association (C.C.A.) (A. 110, 41, 73). Numerous witnesses testified that Mexican American candidates in at-large elections had little or no hope of winning unless they obtained C.C.A. endorsement (A. 42, 48-49, 55, 66). As a result, Mexican American City Council representation in Dallas depends on the grace of C.C.A. This dependency relationship frustrates Chicano political aspirations and means that any successful Mexican American aspirant would have to be responsive to the Anglo-dominated C.C.A., rather than to his popular constituency (A. 65).[6]

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which allow greater participation in the political processes within Dallas for Mexican-American voters, that would be unavailable in a single-member district voting plan." 399 F. Supp. at 794 (A. 140).

[6]As to blacks, the district court found this phenomenon "[a]nother shadow of dilution," since "[m]eaningful participation in the political process must not be a function of grace, but rather is a matter of right", 399 F. Supp. at 790 (A. 134).

SUMMARY OF ARGUMENT

I.A. This Court has consistently held that in formulating a remedy for at-large election schemes which unconstitutionally dilute minority voting rights, single-member districts are strongly preferred. Connor v. Johnson, 402 U.S. 690 (1971). Petitioners ask the Court to establish an exception to this remedial rule whenever a state or local political entity submits a redistricting plan which is not itself unconstitutional. The Court should reject that position and should hold that once a district court has made a finding that the at-large scheme is unconstitutional, the rule of Connor v. Johnson should guide the court in devising a complete remedy, regardless of whether the court draws its own remedial plan or acts on suggestions by the political entity. (pp. 12-17)

I.B. The remedial plan submitted by Dallas, containing three at-large seats, is a court-ordered plan. It was not enacted in the normal course of legislation, but was hastily submitted after the district court made its finding of unconstitutionality and declared its intention

to grant relief. The Dallas plan was not and could not have been enacted at all. Rather, the Dallas City Council merely invited the district court to order its proposal into effect. Dallas made no effort to submit its plan for Section 5 preclearance, 42 U.S.C. §1973c, which was necessary unless the plan was deemed court-ordered. Thus the usual rule requiring single-member districts in court-ordered plans is applicable. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976). (pp. 17-28)

II. In formulating a remedial plan, the district court was bound to utilize single-member districts unless exceptional circumstances justified a hybrid plan including at-large seats. No such circumstances existed here.(pp. 29-31)

A. The district court's reliance on the purported benefits of at-large voting to Mexican Americans is misplaced. The hybrid plan handicaps Mexican Americans as well as blacks, and perpetuates the dilution of their vote. Minority voters would be better off under the plans submitted by the black plaintiffs. The

district court's remedial plan not only fails to enhance minority political access; it also perpetuates the unconstitutional features of the original at-large election scheme.(pp. 32-40)

B. The alleged need for city-wide perspective is not a self-evident justification for remedial use of at-large districts. Dallas made no special showing here as to why the goal of having city-wide perspective on the Council requires retention of three at-large districts. On this record, the district court was not justified in departing from the rule of preference for single-member districts. (pp. 40-46)

ARGUMENT

I. THIS COURT'S STRONG PREFERENCE FOR SINGLE-MEMBER DISTRICT REMEDIAL PLANS TO REPLACE UNCONSTITUTIONAL AT-LARGE ELECTION SCHEMES APPLIES TO THIS CASE.

A. The Preference For Single-Member Districts May Not Be Put Aside Merely Because A State Legislative Body Suggests Another Remedy.

Petitioners rely heavily on the distinction between "court-ordered" (or "court-initiated") and "State-initiated" reapportionment plans (Pet. Br. 10-11). Defining a State-initiated plan very broadly to include one submitted "within a reasonable time" after a judicial finding that the prior apportionment was unconstitutional, petitioners argue that such a State-submitted remedial plan must be approved, provided only that it meet minimum constitutional standards (Pet. Br. 10).[7]

[7]The district court apparently followed a like standard. In opening the hearing on a remedy, the court announced that the hearing's purpose was "to determine the constitutionality of the new proposed plan by the City of Dallas" (A. 29).

The rule of law petitioners suggest would eviscerate important remedial principles developed by this Court in a line of decisions descending from Connor v. Johnson, 402 U.S. 690, 692 (1971), to Connor v. Finch, 52 L.Ed.2d 465, 473-74 (1977).[8] Adoption of that rule would as a practical matter nullify the Court's oft-stated preference for use of single-member districts to remedy at-large shcemes which have been held unconstitutional. See cases cited in n. 8, supra. Since district courts initially defer to the subject political entity for submission of proposed redistricting plans, a rule requiring approval of state-submitted hybrid plans so long as they are not themselves unconstitutional would readily permit circumvention of the preference for single-member districts.[9]

[8]See also, Connor v. Williams, 404 U.S. 549, 551 (1972); Mahan v. Howell, 410 U.S. 315, 333 (1973); East Carroll Parish School Board v. Marshall, 424 U.S. 636, 639 (1976).

[9]The distinction between court-ordered and court-approved plans in the sense proposed by petitioners would also undercut the goal of population equality between districts with little more than de minimis variation, Connor v. Finch, supra, 52 L.Ed.2d at 477. [continued next page]

Instead of focusing on the highly artificial technicality of whether a redistricting plan was "approved" or "ordered" by the district court, or whether the State or the court "initiated" a plan, the courts should determine whether the proposed plan was submitted as the result of a judicial finding of unconstitutionality. When a redistricting scheme containing at-large seats is adopted by the political entity pursuant to its normal legislative functions and not pursuant to a finding of unconstitutionality, than the plan need only meet the Equal Protection standards of the Fourteenth Amendment. White v. Regester, 412 U.S. 755 (1973).[10] A finding of unconstitutional

Under a court-approved plan, a political entity could submit an acceptable reapportionment plan with a total deviation of 16%, Mahan v. Howell, supra; while a court-ordered plan with the same deviation would be unacceptable, Chapman v. Meier, 420 U.S. 1 (1975). A political entity could therefore bypass the federal common law on reapportionment remedies merely by submitting a plan for the district court's approval.

[10]In the case of state-enacted at-large election plans, which are not unconstitutional per se, Whitcomb v. Chavis, 403 U.S. 129 (1973), the plan is valid unless it unconstitutionally dilutes the votes of racial minorities. White v. Regester, supra, 412 U.S. at 765.

dilution, however, requires the district court to adopt a complete remedy, cf. International Salt Co. v. United States, 332 U.S. 392, 401 (1947)' Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975), which will rectify the denial of access caused by the at-large election scheme.

Once an at-large election scheme has been declared unconstitutional, the judicial deference incorporated in the presumption that at-large election districting legislation is not unconstitutional per se no longer applies. The only deference which should then be given to the political entity is an opportunity to formulate a redistricting plan which complies with the Court's stated preference for single-member districts unless "insurmountable difficulties",[11] "unique factors",[12] or "special circumstances"[13] dictate otherwise.[14] The availability of a complete remedy for un-

[11]Connor v. Johnson, supra, 402 U.S. at 692.

[12]Mahan v. Howell, supra, 410 U.S. at 333.

[13]East Carroll Parish School Bd. v. Marshall, supra, 424 U.S. at 639.

[14]The drawing of district [continued next page]

constitutional dilution of minority voting rights should not be subjected to a dual standard within the control of the discriminating legislative entity.

A complete remedy to correct the deficiencies of an unconstitutional at-large election scheme requires implementation of a single-member district plan. The remedy will remain incomplete if at-large districts are utilized in correcting the deficiencies caused by an unconstitutional at-large election scheme. The pernicious effects of unconstitutional at-large election voting do not disappear merely because the scheme now incorporates some single-member district seats. The Court's preference for remedial use of single-member districts flows from its recognition of the "practical weaknesses inherent" in at-large election schemes, Chapman v. Meier, supra, 420 U.S. at 15-16. These problems include the difficulty of evaluating multiple candidates, the length and complexity of ballots, and the prevalence of bloc voting which are fostered by at-large

boundary lines to conform to neighborhood or geographical boundaries is an example of a state or local choice to which federal courts should defer, assuming constitutional and remedial sufficiency of the proposals.

districting. Id. Such "weaknesses" are particularly damaging to racial minorities' political aspirations.

For these reasons, the Court should decline to establish a separate, permissive standard for use of at-large districts in remedial plans when the plan is submitted by a political entity which has unconstitutionally diluted minority citizens' voting rights.

B. The Plan Adopted Below Is Court-Ordered, Since Petitioners Submitted It In Response To A Finding of Unconstitutional Dilution Of Voting Rights.

The Court may identify the pertinent distinction as being between "court-ordered" and "state-enacted" plans,[15] as between plans enacted in the normal course of state legislation and those formulated in response to a judicial finding of unconstitutionality, or in some other manner. No such labels should be mechanically applied. However articulated, the crucial inquiry is into the origin of the plan submitted by the Dallas City Council and adopted by

[15] These terms were utilized by Mr. Justice Powell in his grant of a stay herein, 54 L.Ed.2d 41, 44.

the district court. The only fair conclusion of that inquiry here is that the eight/three plan is of the type that we will henceforth denominate for convenience a court-ordered (as opposed to state-enacted and court-approved) plan.

In determining whether a plan is to be designated a court-ordered or court-approved plan, the chief inquiry is whether the political entity enacted the legislative plan on its own authority or if the equitable power of a federal court order was invoked in implementing the legislative plan. See, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The City of Dallas eight/three proposal was nothing more: the legislative authority of the City of Dallas did not even allow the City Council to adopt a redistricting which could then be submitted for court approval.

Dallas is governed by a Home Rule Charter pursuant to the Home Rule Amendment, Article XI, Section 5 of the Texas Constitution. That Charter required elections for City Council on an at-large basis until after entry of the district court's opinion (A. 188). Locally-initiated changes in these charter provisions

could only be made pursuant to the Home Rule Amendment's provision that qualifying cities

> may by a majority vote of qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature...

Article XI, Section 5, Texas Constitution. Furthermore, Vernon's Ann. Civ. Stat. Art. 1165 establishes that a Home Rule City Charter cannot be amended unless a majority of the voters in a Charter Revision Election vote to approve the amendment.[16] In recognition of this limitation on amending the City Charter, Chapters IV and VIII of the Dallas City Charter provide that any amendments must be approved in a special election.[17] Finally, Chapter XXIV, §16 of

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[16] A similar procedure is utilized by towns and villages incorporated pursuant to Vernon's Ann. Civ. Stat. Art. 1133. For those political entities incorporated pursuant to Art. 1133, the charter of the town or village cannot be amended unless the board of aldermen and two-thirds of the voters at a special Charter Revision Election approve the proposed amendment. Vernon's Ann.Civ. Stat. Art. 1153. Thus, the State of Texas has been at pains to remove from municipalities the power to redistrict themselves without advance approval of the electorate.

[17] See also, Vernon's Ann. Civ. Stat. Art. 1170.

the Charter prohibits the city from undertaking any action which would violate state laws or the Texas Constitution. See also, Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641, 644 (Tex. 1975) ("The powers of home rule cities are subject to and may be limited only by their charters or by the Constitution or by general law").

The manner and method of electing members to the Dallas City Council is specified in the City Charter. Thus any change in the procedure for electing council members would necessitate an amendment of the City Charter requiring approval by city voters. When the district court on January 17, 1975 held that the Dallas at-large election scheme was unconstitutional, the court gave the City an opportunity to offer any plans to remedy this constitutional violation. In response, the City Council, by City of Dallas Resolution No. 75-0207, sec. 1 (A. 188), authorized the City Attorney to submit the eight/three plan to the district court (A. 30). The City Resolution could not effectuate a change in the City

Charter.[18] Consequently, prior to submitting the plan to the district court, the plan was merely a proposal, since the Dallas City Council could not reapportion "itself on its own authority,"[19] cf. East Carroll Parish School Board v. Marshall, supra, discussed below. For this reason,

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[18]The district court also recognized the limitations on the City Council to change the City Charter:

> Changes to the voting system necessarily are changes to the Charter and absent a judicial determination of unconstitutionality, such changes can only be effected by a Charter Amendment adopted by the voters.
>
> It is a City Charter provision which is at issue, not a mere ordinance. A majority vote of the registered voters of the City is required to change the Charter. The members of the City Council, cannot, on their own, modify the Charter to alter the voting scheme. Council's role is to propose changes to the Charter by proposed amendment which in turn is approved or rejected by the voters of Dallas.

399 F. Supp. at 800 (A. 150-51).

[19]The City Council in subsequently enacting Ordinance No. 14800 acknowledged this inability to enact redistricting legislation:

> Section 2. As a result of the decision of the United States District Court [continued next page]

the district court ordered that the eight/three plan as had been offered by the City be submitted "in time for the April 1975 city council elections", 399 F. Supp. at 798 (A. 147). The basis for the utilization of the City's eight/three plan was therefore a federal court order, not the City Council Resolution. In fact, the City of Dallas did not hold a Charter Election until April 3, 1976 to determine whether the City electorate would approve the proposed manner for electing council members.[20]

These facts present the same situation

> for the Northern District of Texas in the case of Albert L. Lipscomb, et al. v. Wes Wise, et al., CA-3-4571-E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7, and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7, and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11.

Pet. Br. 4.

[20]The City approved the change and the charter was amended in 1976.

as East Carroll Parish School Board v. Marshall, supra. In East Carroll Parish, the plan was listed as a court-ordered plan because the police jury had no legislative authority to enact a reapportionment. Prior to 1968, applicable Louisiana laws prohibited the implementation of at-large election schemes for police juries. However, in 1968 the state legislature proposed a statute permitting police juries to convert to at-large election schemes. When submitted to the United States Attorney General for preclearance pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, an objection issued. This letter of objection rendered the legislative act legally unenforceable.[21] Consequently, the East Carroll police jury lacked legislative authority to convert to an at-large election scheme. This Court discussed the absence of authority in the context of whether the policy jury reapportionment of 1971 had to be submitted pursuant to Section 5:

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[21]See, Connor v. Waller, 421 U.S. 656 (1975); Morris v. Gressette, 53 L.Ed.2d 506, 514 n. 8 (1977); United States v. Board of Commissioners of Sheffield, Alabama, 46 LW 4189, 4196 (1978).

> Had the East Carroll police jury reapportioned itself on its own authority, clearance under Sec. 5 of the Voting Rights Act would clearly have been required. However, in submitting the plan to the District Court, the jury did not purport to reapportion itself in accordance with the 1968 enabling legislation... which permitted police juries and school boards to adopt at-large elections. Moreover, since the Louisiana enabling legislation was opposed by the Attorney General of the United States under Sec. 5 of the Voting Rights Act, the jury did not have the authority to reapportion itself.

424 U.S. at 638 n. 6 [citations omitted], cited also in Wise v. Lipscomb, 54 L.Ed.2d at 45 n. 2 (1977) (Powell, J., order staying judgment).

Although the district court did not explicitly refer to the eight/three plan as a court-ordered plan, and indeed stated that it had "approved" the plan, 399 F. Supp. at 798 (A. 148), the Court should not be confined by labels in assuring that important principles of voting remedies should be properly implemented. The district court's statement that it "approved" the Dallas plan cannot mask the fact that the court had no valid legislation before it for approval. The district court's

implementation of the City's eight/three plan was--and could only have been--pursuant to a court-ordered plan.

The April 3, 1976 City Charter Election by which Dallas' voters adopted the 8-3 plan (see p. 22, n. 20, supra) cannot retroactively make the 1975 reapportionment effective as a legislative act. Neither the Constitution and laws of Texas nor the Dallas Home Rule Charter authorize giving retroactive effect to charter amendments. To hold the 8-3 plan "court-approved" in these circumstances would in effect give the City Council the power of nunc pro tunc legislation which neither Texas nor Dallas has granted the Council.

The failure of Dallas to submit its eight/three plan for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, is further evidence that the plan could be considered at most a suggestion rather than state-initiated legislation. In the absence of a federal court order implementing the plan, Dallas was required to submit it to the Attorney General of the United States or the District Court for the District of Columbia, for determination that the change does not

have a discriminatory purpose or effect on grounds of race, color, or membership in an applicable language minority group. 42 U.S.C. §1973c.[22] Elections conducted without Section 5 preclearance would have been invalid but for the federal court order.[23] The only exception to this preclearance requirement, which this Court has always strongly enforced,[24] is for "court-ordered plans resulting from equitable jurisdiction over adversary proceedings," East Carroll Parish School Board v. Marshall, supra, 424 U.S. at 638 n. 6; Morris v. Gressette, supra, 53 L.Ed.2d at 514 n. 8 ("a reapportionment scheme...submitted and adopted

[22] In 1975 the Voting Rights Act was extended to cover Texas, and to require preclearance submission of all post-November 1, 1972 changes affecting voting. This Court has in the past year affirmed that Texas jurisdictions are covered, Briscoe v. Bell, 53 L.Ed.2d 439 (1977), and that municipalities like Dallas are subject to Sec. 5 procedures, United States v. Board of Commissioners of Sheffield, Alabama, supra.

[23] See, United States v. Board of Supervisors of Warren County, Miss., 51 L.Ed.2d 106, 110 (1977); Silva v. Fitch, __F. Supp.__(W.D. Tex. No. SA-76-CA-126, 1976) (three-judge court), aff'd 51 L.Ed. 2d 528 (1977).

[24] See, United States v. Board of Commissioners of Sheffield, Alabama, supra, 46 LW 4192-93, and cases therein cited.

pursuant to court order" is not subject to Section 5).

The Voting Rights Act clearly established a heightened standard for review of election law changes, including redistricting, in political jurisdictions which are subject to the preclearance requirements of Section 5.[25] One alternative procedure for assuring review under the heightened standard is the Section 5 mechanism, in which the local jurisdiction must assume the burden of persuasion of the issue of non-discrimination. The reason that procedure does not apply where the voting law change is court-ordered is precisely that the federal courts then have the equitable power and duty to remedy the constitutional violation fully and effectively, not just minimally. See pp. 15-16, supra. To accept the eight/three plan on the basis of its being "court-approved" or "state-initiated" in this case would allow Dallas to avoid Section 5 and at the same time excuse the

[25] See, e.g., Georgia v. United States, 411 U.S. 526 (1973); Beer v. United States, 425 U.S. 130 (1976); United States v. Board of Commissioners of Sheffield, Alabama, supra.

district court from applying the strong preference for single-member districts. Such a holding would give recalcitrant jurisdictions an invitation and road map to perpetuating the denial of political access to racial and ethnic minorities to the greatest extent possible by retaining as many at-large districts as they could.[26]

The Court should hold that the Dallas eight/three plan was court-ordered, and therefore must be reviewed under the single-member district principle established in Connor v. Johnson, supra.[27]

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[26] Illustrative of the consequences of such an approach are the actions of the Waco, Texas Independent School District. After a district court found that the Waco I.S.D. all-at-large election scheme unconstitutionally diluted both black and Mexican American voting rights, __F. Supp.__(W.D. Tex. No. W-74-CA-21, Feb. 27, 1976), Waco I.S.D. proposed a hybrid plan calling for election to four seats by district and three seats at-large. When the district court found the 4-3 plan inadequate to remedy the discrimination, id., Waco I.S.D. made the smallest incremental change possible, submitting a 5-2 plan. The district court accepted this scheme. (The case is now pending on appeal, on the remedy issue, 5th Cir. No. 76-2264.)

[27] In the event the Court finds the district court's eight/three plan exempt from the strong preference for single-member districts, on the grounds that the plan was "state-initiated" or [continued next page]

II. NO SPECIAL CIRCUMSTANCES JUSTIFY USE OF AT-LARGE DISTRICTS IN THE REMEDIAL PLAN FOR DALLAS.

The district court erred in holding that the situation of Mexican American voters in Dallas and the desirability of a city-wide perspective on the City Council constituted special circumstances justifying the implementation of a hybrid eight/three plan. 399 F. Supp. at 792 (A. 137). The record in this case does not require or support any deviation from the usual preference for single-member districts.

This Court has articulated and applied the very heavy burden which a district court has to overcome before departing from the single-member district rule in several slightly different ways. Connor v. Johnson, supra, 402 U.S. at 692, held that legislative single-member districts were to be implemented, "absent insurmountable barriers." The Court reversed a trial court finding that lack of sufficient time

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"court-approved", logic requires that petitioners be directed to seek Section 5 preclearance. Morris v. Gressette, 53 L.Ed.2d at 512 n. 2.

to prepare a single-member district plan before an upcoming primary constituted such a barrier, and found that time pressures imposed by an impending election did not justify departure from the single-member district rule, 402 U.S. at 692. In East Carroll Parish School Board v. Marshall, supra, the Court summarily held that there were no "special circumstances" which required multimember districts.[28] This Court has found reason to allow multimember districts as part of a remedial plan on only one occasion. In Mahan v. Howell, 410 U.S. 315 (1973), the Court approved limited use of a multimember district for Virginia Senate seats upon a finding that the case presented a "singular combination of unique factors," 410 U.S. at 333. The Court allowed use of a three-member district combining three proposed single-member districts which contained significant

[28]The Court so held although the Court of Appeals opinion noted that blacks constituted close to half of the electorate and that three black candidates had run successfully in recent at-large elections. See Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1975) (en banc).

population disparities and assigned military personnel to districts where they did not reside, 410 U.S. at 332.[29] Even in these extreme cases, the imposition of the multimember district was as an interim remedy only, and the Court specifically encouraged Virginia to substitute a constitutionally sound single-member district plan, 410 U.S. at 333. n. 13.

The Fifth Circuit has correctly interpreted these decisions to mean that, "[t]he term, 'special circumstances,' encompasses only the rare, the exceptional, not the usual and diurnal," Wallace v. House, 538 F.2d 1138, 1144 (5th Cir. 1976), cert. denied 53 L.Ed.2d 1060 (1977). The evidence relied on by the district court and by petitioners simply does not meet the standards established by this Court for remedial use of at-large districts in a hybrid plan.

[29]The Court referred to "plausible evidence of substantial malapportionment with respect to military personnel, the mandate of this Court that voting discrimination against military personnel is constitutionally impermissible,...and fear that too much delay would have seriously disrupted the Fall 1971 elections." 410 U.S. at 333 [citation omitted].

A. The Hybrid Plan Does Not Enhance Mexican American Voting Rights.

1. The Eight/Three Plan Does Not Benefit Mexican Americans.

Although the district court found no dilution of the Mexican American vote, the court nevertheless recognized the right of Mexican Americans "not to be invidiously excluded from participation in the political life of Dallas." 399 F. Supp. at 793 (A. 139). According to the district court's analysis of Dallas politics, Mexican Americans would benefit from at-large voting. The court somewhat speculatively concluded that an all single-member district plan might tend to decrease their participation in the political process, 399 F. Supp. at 793 (A. 139-40).

Intervenors believe that the district court's analysis reverses the political reality: voting rights of Mexican Americans would be enhanced by implementation of plaintiffs' single-member district plans, and are diluted by at-large districts and the hybrid plan.

Mexican Americans have even less access to the political process implemented

by the district court than they had under the previous all at-large system. Mexican American aspirants for city-wide places would continue to be dependent upon C.C.A. endorsement (A. 36, 73). The eight/three plan therefore inhibits the attainment of Chicano political independence that accompanies enjoyment of an undiluted vote (A. 49, 51, 58). Moreover, although C.C.A. occasionally endorsed a Chicano candidate when there were eleven at-large districts, C.C.A. is unlikely to support a Mexican American for one of the two at-large places available. (A. 71).[30]

Plaintiffs' proposed plans calling for either eleven single-member districts or a ten/one plan with only the mayor elected at-large would provide the Mexican American community with far greater opportunity to make its vote effective. Plaintiffs' expert, Dr. Dan Weiser, testified that under plaintiffs' plan, District 2 would be approximately 31% Mexican American, 35% black, and 34% Anglo, providing

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[30]The third at-large position of mayor is not realistically available to minority candidates in a racially polarized city with only 35% minority population.

some chance for a Chicano to be elected (A. 71-72).[31] Witness Robert Medrano, a Chicano, testified that in 1974, after twice losing at-large races, he won election to the Dallas I.S.D. board from a district virtually identical to the proposed District 2 (A. 83-86). He stated that a similar City Council district would be a very attractive possibility for him, while the eight/three plan would preclude such a race (A. 87, 89).

Elections held under the eight/three plan adopted by the district court bear out the adverse effect of that plan on Chicano political fortunes. In the April 1975 Council election, Pedro Aguirre, a Mexican American incumbent, ran at-large and was defeated by a margin of 65%-35% (A. 154, 159, 162, 164-65).[32] Projections of the same vote show Aguirre obtaining 42.4% and 43.1% of the vote in plaintiffs'

[31]Dr. Weiser also noted that plaintiffs' plan would also establish three districts with black majorities, thereby enhancing the voting strength of the plaintiff class (A. 71).

[32]Two black Council members were as expected elected from the "safe" black districts created in the eight/three plan.

proposed District 2, tabulated as it would be under plaintiffs' two proposed plans (A. 155).[33] Mexican American candidates also failed in the April 1977 general election and the November 1977 special election.[34] Thus, the court's eight/three plan has not permitted any greater degree of direct Mexican American representation and has eliminated what direct representation previously existed. The eight/three plan also gives Mexican Americans less "swing vote" strength than would plaintiffs' plans. In District 2 of the court-adopted plan, Mexican Americans are less numerous than blacks (20% versus 25.9%) and both minorities combined fall short of a population majority, 399 F. Supp. at 795 (A. 143). In plaintiffs' plans, Mexican Americans in coalition

[33]As plaintiffs have previously noted, "This result was achieved without any special efforts that a candidate would normally make within his district when running in a single-member district situation rather than at-large" (A. 155).

[34]Although not reflected in the record made below, it is of public record that in the general election one Mexican American ran at-large and was defeated. In the special election for an at-large seat, two Mexican American candidates ran unsuccessfully.

with either Anglo or black voters could control a majority in District 2, thereby ensuring responsiveness to the Chicano community even if no Chicano candidate ran.

On these facts, the district court's conclusion that the eight/three plan enhanced political access for the Dallas Mexican American community is untenable. The record will not support a finding that the purported benefits of at-large voting for Mexican Americans constitute an unusual circumstance justifying departure from the single-member district rule.

2. The Eight/Three Rule Itself Unconstitutionally Dilutes Minority Voting Rights.

This Court has frequently held that a reapportionment plan, formulated in the context of denial of access of minority groups to the political process, which would perpetuate that denial is itself unconstitutional, White v. Regester, supra, 412 U.S. at 766; Whitcomb v. Chavis, supra, 403 U.S. at 149. See also, Kirksey v. Board of Supervisors of Hinds County, Miss., 554 F.2d 129, 143 (5th Cir. 1977) (en banc), cert. denied 46 USLW 3357 (1977). Since the

hybrid eight/three plan adopted below perpetuates the dilution of black voting strength and actually increases the denial of political access to Mexican Americans, it denies rights guaranteed under the Fourteenth and Fifteenth Amendments.

Both the at-large and single-member aspects of the district court's remedial plan operate to continue this dilution of the black vote in Dallas. The existence of three at-large districts dilutes black voting strength for the same reasons that the all single-member plan did so, see 399 F. Supp. at 790 (A. 133-34). This feature of the plan therefore "will continue in effect an existent denial of access to the minority," Kirksey v. Board of Supervisors of Hinds County, Miss., supra, 554 F.2d at 143. The plan's other eight districts also fail to provide a complete remedy for dilution. While the standards for evaluating dilution have been developed in the context of all multimember schemes, the courts recognize that single-member districts may be drawn in such a way as to deny minorities political access. This may be true, even when the minority group comprises the majority

of the population in some single-member districts. See, Kirksey v. Board of Supervisors, supra, 554 F.2d at 143. Cluster dilution such as that involved in the oversaturation of blacks in two districts and their virtual elimination from the other districts involved in this plan is unconstitutional denial of political access. Burns v. Richardson, 384 U.S. 73, 88 (1966).[35] This conclusion is reinforced by clear record evidence that there were other, clearly non-discriminatory alternatives.[36]

Dilution of Mexican American voting strength by the eight/three plan is even more severe. There is no significant concentration of Mexican Americans in any of the eight single-member districts in the court's plan, nor do Mexican Americans constitute the primary ethnic group in any district. Although Mexican Americans are dispersed throughout Dallas, they are not benefitted by at-large voting. See

[35]District 1 is 73.6% black; District 2 is 87.3% black. The district with the next highest minority concentration is 25.9% black and 20.0% Mexican American. 399 F. Supp. at 795 (A. 143).

[36]See pp. 33-36, supra.

pp. 33-35 , supra. Moreover, the single-member districts proposed in plaintiffs' plans would have provided significantly greater representation and access than the eight/three plan. See pp. 33-34, supra.

This Court's decision in Mahan v. Howell, supra, suggests that the preference for single-member district remedial plans should be overriden only when such a plan would operate unconstitutionally. See 410 U.S. at 331-32; cf. Wallace v. House, 538 F.2d 1138, 1145 (5th Cir. 1976), cert. denied 53 L.Ed.2d 1060 (1977). Here, far from being unconstitutional, the all-single-member plan would avoid the unconstitutional effects of retaining three at-large districts and minimizing minority voting strength in the eight other districts. In terms of racial impact, cf. United Jewish Organizations of Williamsburg v. Carey, 51 L.Ed.2d 229 (1977),[37] the

[37]Petitioners' reliance on United Jewish Organizations v. Carey goes only to meet the rationale of the Fifth Circuit decison herein. It does not meet the arguments respondents rely on here. On the contrary, the Carey decision supports our position. It held that measures to enhance minority political access could be taken into account, in the absence of a finding of unconstitutionality, [continued next page]

district court's plan actually diminishes the access of Mexican Americans, while it fails to assure the access of blacks. For this additional reason it does not pass constitutional muster as a remedy for Dallas' original at-large election scheme.

B. The Alleged Need For At-Large Districts To Provide City-Wide Perspective Is Not Substantiated.

The district court also found the need for a city-wide view on the council to be a special circumstance justifying a departure from the all single-member district preference, 399 F. Supp. at 794 (A. 141). This concern for a city-wide perspective has never been recognized by this court as a per se justification for at-large districts in court-imposed

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when a State enacts a reapportionment plan to seek compliance with Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. 51 L.Ed.2d at 245. It held also that such considerations did not offend the Constitution since they did not imply any "racial slur or stigma," 51 L.Ed.2d at 246.

The basic error committed by the district court was not that it considered the impact of the remedy on Mexican Americans at all, but that it utilized incorrect legal standards--both as to the degree of deference to be accorded to Dallas and as to the determination of "special circumstances" relating to Mexican Americans--in formulating "race-conscious remedies," 51 L.Ed.2d at 249 (Brennan, J., concurring).

remedial plans. It should not be recognized as an unusual circumstance here.

A political entity's desire for district-wide representation on its governing board is a general rather than a special circumstance. In every instance where a governing board is forced to reapportion, it can make an argument that overall perspective is desirable if not absolutely necessary. This Court's decision in East Carroll Parish, supra, and its summary reversal of a decision approving a plan with one at-large district in Wallace v. House, 425 U.S. 947 (1976),[38] indicate that it is

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[38] In Wallace v. House, 515 F.2d 619 (5th Cir. 1975) (en banc), the Fifth Circuit ordered implementation of a hybrid plan to remedy unconstitutional dilution of black voting strength. The one at-large district in the plan was justified in part by reliance on the principle that:

> at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties.

515 F.2d at 633. In summarily reversing, this Court apparently felt that East Carroll Parish, supra, disposed of the Fifth Circuit's justification.

On remand, the Fifth Circuit held that its former holding, which had approved one at-large representative, had to yield to the preference [continued next page]

not willing to elevate this general circumstance to the level of a special circumstance.

In finding to the contrary in the instant case, the district court relied on Fortson v. Dorsey, 379 U.S. 433 (1965), and Chapman v. Meier, supra, as support for the proposition that provision of city-wide representation could serve as a justification for at-large districts in court imposed remedial plans. See 399 F. Supp. at 795 (A. 142). The district court's reliance on Fortson is misplaced. Fortson did not involve a successful challenge to the constitutionality of an at-large election scheme. Rather, it was an unsuccessful challenge to a Georgia redistricting scheme, which included multimember districts, based on the 1960 census. The primary issue in Fortson was whether multimember districts violated the one person-one vote principle, not whether they unconstitutionally diluted minority voting

for single-member districts. Wallace v. House, 538 F.2d 1138 (5th Cir. 1976), cert. denied 53. L.Ed.2d 1060 (1977).

strength.[39] The sole reference to a district wide perspective in Chapman, 420 U.S. at 42 n. 14, states that representation of city-wide or region-wide views may be a conceivable rationale supporting multimember districts. This statement alone does not support the elevation of city-wide perspective to the status of a special circumstance.

The record in this case does not justify recognition of city-wide perspective as a special circumstance. There has been no showing that there is any unique or compelling need in Dallas to have a city-wide perspective represented on the Council, or that such perspective would be insured by the election of three council members at-large. On the contrary, the unique role played by C.C.A. might tend to make the three at-large representatives reflect a narrower perspective, rather than

[39] Similarly, petitioners' reliance on Dusch v. Davis, 387 U.S. 112 (1967), and Dallas County, Alabama v. Reeves, 421 U.S. 477 (1975), in support of the same principle is inappropriate. These cases, like Fortson, supra, uphold the constitutionality of multimember schemes challenged as violating the one person-one vote rule and do not involve fashioning remedies after a finding that the multimember scheme is unconstitutional.

a broader one.[40] Although there was some testimony that decisions on zoning, redevelopment and other matters require a perspective going beyond the boundaries of a particular neighborhood (see A. 141), there is no evidence that council members elected from single-member districts would be unable or unwilling to consider such matters fairly. It is unlikely that council members elected from single-member districts containing approximately 80,000 people each would be unduly parochial in their views.[41]

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[40] The greater expense of city-wide campaigning and the greater problems of candidate recognition in a city-wide district make C.C.A. support critical and make localized candidate efforts to overcome lack of C.C.A. endorsement more difficult. For these reasons, successful at-large candidates may well be beholden to C.C.A. and its perspective, rather than that of some 80,000 residents of a single-member district.

[41] The size of districts in Dallas significantly undermines any argument that representatives from single-member districts would respond to narrow interests. In the other cases in which this Court expressed preference for single-member districts, the districts were considerably smaller. See, e.g., Wallace v. House, 425 U.S. 947 (1976) (Ferriday, Louisiana, five districts for population 5,200); East Carroll Parish School Board v. Marshall, supra (East Carroll Parish, Louisiana, [continued next page]

CONCLUSION

In granting a redistricting remedy for unconstitutional dilution of minority voting rights, single-member district remedial plans should be utilized in the absence of special circumstances requiring at-large districts. No such circumstances exist in this case. The judgment of the Court of Appeals should therefore be affirmed.

DATED: March 28, 1978.

Respectfully submitted,

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seven districts for population 12,884); Connor v. Johnson, supra, (Mississippi legislature statewide; largest county, Hinds, had five Senate districts and twelve House districts for population 214,973, see 402 U.S. at 691 and Connor v. Finch, supra, 52 L.Ed.2d at 479).

Supreme Court, U. S.
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No. 77-529

In the Supreme Court of the United States

OCTOBER TERM, 1977

WES WISE, MAYOR OF THE CITY OF DALLAS, ET AL., PETITIONERS

v.

ALBERT L. LIPSCOMB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77–529

WES WISE, MAYOR OF THE CITY OF DALLAS, ET AL., PETITIONERS

v.

ALBERT L. LIPSCOMB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves important questions concerning the remedies that may be applied when an exclusively at-large system of electing city council members unconstitutionally dilutes the vote of black citizens. The Court's resolution of the issues presented may affect remedial standards in voting rights suits by the Attorney General authorized by 42 U.S.C. (and Supp. V) 1971 (a) and (c) and 1973j. The case also raises the question whether a legislatively enacted reapportionment plan that incorporates the terms of an earlier court-ordered plan is subject to the preclearance requirements of Section 5 of the Voting Rights Act of

1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c.

QUESTIONS PRESENTED

1. Whether the court-ordered reapportionment plan for the Dallas City Council improperly provided for the at-large election of three Council members.

2. Whether, in a state covered by Section 4 of the Voting Rights Act of 1965, a legislatively enacted reapportionment plan that embodies the terms of an earlier court-ordered plan is subject to the preclearance requirements of Section 5 of the Act.

STATEMENT

Dallas, Texas, has had a council-manager form of government since the City adopted a home-rule Charter in 1931. Legislative authority is exercised by the City Council; the executive is a City Manager selected by the Council. The 1931 Charter provided for a Council of nine members, including the Mayor.[1] Members were elected, for two-year terms, on an at-large (*i.e.*, city-wide) basis (App. 124, 188). Ballots contained nine numbered "places," one for each Council seat, and all qualified voters in the City could cast one vote for each place. To be elected, a candidate had to receive a majority of the votes cast for his place (App. 124, 188).[2]

The Charter of a Texas home-rule city such as Dallas cannot be amended except by a majority vote

[1] Apart from his duties as a Council member, the Dallas Mayor performs a primarily ceremonial function.

[2] Before 1931, the legislative body in Dallas was a five-member board of commissioners. Under a 1907 state statute, each member of this board was elected at-large (App. 188).

of the registered voters in the city (Texas Const. Art. XI, § 5, see App. 150–151). In 1968, the Charter was amended by referendum to expand the size of the Council from nine to eleven (App. 124; Pet. Br. 3). The City was divided into eight residential districts for Council elections. One numbered place on the ballot was assigned to each district, and candidates for each of those eight places were required to be residents of the corresponding district. No residence requirement applied to the remaining three numbered places, one of which was the Mayor's. Voting for all eleven places was city-wide, and a majority vote was necessary for election to each seat (*ibid.*).

According to 1970 census data, Dallas has 844,401 residents, of whom 210,238 (25 percent) are black and 67,902 (8 percent) are Mexican-American. Approximately 93 percent of all the black residents of Dallas are concentrated in a predominantly black inner-city area, characterized by relatively poor housing, low income and high unemployment (App. 124–125). Mexican-Americans, on the other hand, live throughout the City (App. 138).

Until 1969, no black person had been elected to the Dallas City Council (App. 127). In elections in which black candidates participated, racial bloc voting resulted in their defeat. Black candidates who carried the inner-city area by large majorities were defeated by white opponents who obtained majorities in the more populous white residential areas of the City (App. 125–126). Elections have been non-partisan; slating groups rather than political parties have endorsed Council candidates. The most influential slat-

ing group has been the Citizen's Charter Association ("C.C.A."); 85 percent of the candidates endorsed by C.C.A. have won election (App. 126–127). C.C.A. first endorsed a black candidate in 1969, and he was elected; C.C.A.'s endorsement was apparently given in return for black support of the 1968 Charter amendment that expanded the size of the Council from nine to eleven (App. 127–128).

The present lawsuit was brought in 1971 by black and Mexican-American residents of Dallas who claimed that the at-large system of electing Council members unconstitutionally diluted the vote of racial minorities. The complaint sought a permanent injunction requiring all Council members to be elected from single-member districts (App. 11). The district court dismissed the complaint for failure to state a claim upon which relief could be granted, but the court of appeals reversed. *Lipscomb* v. *Jonsson,* 459 F. 2d 335 (C.A. 5). On remand, several plaintiffs, including all of the Mexican-American plaintiffs, were dismissed from the case for failure to respond to interrogatories (App. 26–27). A plaintiff class, including all black citizens of Dallas, was then certified (App. 28). Two Mexican-Americans subsequently attempted to intervene. The district court denied the application, but specifically granted applicants the right to participate at a remedy hearing in the event the at-large election system was later declared unconstitutional (App. 27–28).

On January 17, 1975, following an evidentiary hearing, the district court issued an oral opinion holding that the system of at-large elections for the Dallas

City Council unconstitutionally diluted the voting strength of blacks (VIII Tr.).[3] Petitioners have not challenged this ruling. In support of its conclusion, the court cited Dallas's history of *de jure* discrimination; the concentration of blacks in an identifiable inner-city area found to be a product of that discrimination; the pattern of racial bloc voting; and the power of the C.C.A. slating group.[4] The district court announced that it would afford "the city council of Dallas an opportunity to devise and present * * * a plan calling for election of members of the Dallas city council which meets constitutional standards" (VIII Tr. 22). A further hearing was set for February 6, 1975.

On January 20, 1975, the City Council passed by a 6–5 vote Resolution No. 75–0207, which provided (App. 188):

> Section 1. That the City Attorney be, and he is hereby directed to notify the Judge of the United States District Court for the Northern District of Texas, Dallas Division, that it is the intention of the majority of this City Coun-

[3] "VIII Tr." refers to Volume VIII of the transcript of the district court hearing. The transcript of the court's oral opinion apparently constitutes Volume VIII of the entire transcript, and we are so identifying it, even though the Roman numeral designation has been omitted from that portion of the transcript dated January 17, 1975.

[4] These findings and conclusions also appear in the district court's written opinion of March 25, 1975 (App. 121–135), which is reported at 399 F. Supp. 782 (N.D. Tex.). The district court stated that there had been a recent and significant improvement in the City's responsiveness to the needs of minority groups (App. 134–135), and noted that there were two blacks and one Mexican-American on the Council, all of whom had been endorsed by C.C.A. (App. 127–128 and n. 5; IX Tr. 80–82).

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> cil to pass an ordinance, when prepared by the City Attorney, which will adopt the present eight residential districts as single member districts, with one individual Councilman to be elected from each of the districts and living in the district, and with three individuals, including the Mayor, to be elected at-large with no residential requirements other than that the candidate live within the City limits of Dallas.

On January 24, 1975, this resolution and an accompanying breakdown of population by district and race were filed with the court as the City's proposed plan (App. 3).[5] Under the plan, eight Council members were to be elected from single-member districts of equal population, drawn according to the existing residential district lines; the remaining three Council members (including the Mayor) were to be elected on an at-large basis. All members were to be elected by majority vote (App. 135–136).

The remedy hearing began on February 5, 1975, and the district court stated that the purpose of the hearing was "to determine the constitutionality of the new proposed plan by the City of Dallas" (App. 29). Evidence presented at the hearing showed that the district populations in the City's proposed plan deviated from the one-person, one-vote principle. The City Attorney's office changed certain district lines and a revised plan was submitted to the court on February 8, 1975, the final day of the hearing. The City Attorney referred to this plan as a "proposed ordinance" (XI Tr. 4–7, 12–13; see App. 136 n. 9).

[5] A copy of this plan and transmittal letter has been lodged with the Clerk.

As revised, the demographic pattern of the eight single-member districts in the City's plan was as follows (App. 143):

District	Total population	Percent black	Percent Mexican-American
1	105,559	2.08	7.63
2	105,529	25.90	20.00
3	105,759	5.96	7.00
4	105,676	3.63	3.20
5	105,433	.26	10.60
6	105,604	73.60	7.20
7	105,353	.40	5.00
8	105,448	87.30	3.44

Blacks were to have clear majorities in two districts (Nos. 6 and 8).[6] Mexican-Americans, who comprise 8 percent of the Dallas population and are dispersed throughout the City, were to be in a distinct minority for all eleven Council seats, with a maximum representation of 20 percent in District 2.

Plaintiffs, representing the class of black citizens, objected to the City's plan because it provided for three at-large places. They proposed instead eleven single-member districts of equal population or, in the alternative, ten single-member districts of equal population and one at-large election for Mayor. The districts drawn in the plaintiffs' plans are compact and contiguous, and their geographical configuration is similar to that of the districts in the City's plan (X

[6] The Council considered and rejected an alternative eight/three plan that gave blacks a majority in three of the eight single-member districts (App. 144 n. 20).

Tr. 218).[7] Under each of the plaintiffs' plans, blacks would constitute a majority in three districts; in a fourth district, neither whites, blacks nor Mexican-Americans would form a majority.[8]

[7] Plaintiffs' ten-district plan (Pl. Exh. 108) would produce the following demographic pattern:

District	Total population	Percent black	Percent Mexican-American
1	84, 291	0. 19	6. 49
2	84, 299	39. 10	22. 34
3	84, 967	. 44	7. 06
4	84, 059	4. 41	2. 47
5	84, 072	. 25	4. 27
6	84, 036	56. 68	4. 52
7	84, 878	. 27	3. 98
8	84, 406	61. 82	7. 10
9	84, 092	62. 87	5. 18
10	84, 301	23. 56	17. 06

Plaintiffs' eleven-district plan (Pl. Exh. 109) would produce the following demographic pattern:

District	Total population	Percent black	Percent Mexican-American
1	77, 188	0. 20	7. 73
2	77, 172	35. 21	28. 11
3	76, 466	7. 95	6. 86
4	76, 359	5. 02	2. 56
5	76, 581	. 12	4. 51
6	76, 370	4. 58	7. 53
7	76, 820	. 30	2. 21
8	76, 528	73. 71	3. 86
9	76, 941	60. 56	4. 12
10	76, 574	62. 42	5. 93
11	77, 402	23. 73	14. 83

[8] This latter district is No. 2 in each of the plaintiffs' plans. In the ten-district plan, this district would be 39% white, 39% black and 22% Mexican-American. In the eleven-district plan, it would be 37% white, 35% black and 28% Mexican-American. See note 7, *supra*.

Several Mexican-Americans were allowed to intervene in the remedy hearing, although not as class representatives (App. 135). They opposed the City's plan but offered no plan of their own (App. 137 n. 10). They suggested, however, that the size of the Council should be increased to at least twenty, with each member elected from a single-member district. This approach would allow the drawing of a district in which Mexican-Americans constitute a majority (*ibid.;* App. 171).

Witnesses for the City supported the retention of three at-large seats on two grounds. First, some City officials testified that it was desirable to have some members of the Council represent a city-wide view on such matters as zoning, the budget and city planning.[9] Second, City officials and other witnesses testified that at-large voting was beneficial to Mexican-Americans because of the power of C.C.A., the major slating group. In order to broaden its base, C.C.A. decided in 1971 to endorse a Mexican-American for one of the three nonresidential places on the ballot. After interviewing several Mexican-Americans, C.C.A. selected Pedro Aguirre, who was endorsed and elected.[10] According to Mr. Aguirre and every other witness who testified on this point, it is impossible

[9] The City Manager of Dallas and two members of the Council stated that there was a strong need for some city-wide representation in Council deliberations on such matters (IX Tr. 75–78, 141–143, 198–200). The Mayor, however, did not think that three at-large seats were necessary (IX Tr. 120–122), and the Mayor pro tem was noncommittal (IX Tr. 10–13).

[10] IX Tr. 80–82 (testimony of Mr. Aguirre).

for a Mexican-American to be elected at-large without the endorsement of C.C.A.[11] If the City's plan were implemented, C.C.A. might endorse a Mexican-American for one of the two at-large places other than the Mayor's.[12] It is very unlikely that C.C.A. would endorse a Mexican-American for a single-member district seat.[13] To be elected under an exclusively single-member district plan, Mexican-Americans would need to form coalitions with other groups.[14] The City's witnesses who advocated the retention of some at-large seats recognized that such a scheme would perpetuate the dependence of Mexican-American candidates upon C.C.A.;[15] that Mexican-Americans would be forced "to negotiate [with C.C.A.] just for the opportunity to run";[16] that a Mexican-American endorsed by C.C.A. would owe a debt to the slating group as well as to his constitu-

[11] IX Tr. 29–30, 46 (testimony of Mayor pro tem George Allen); IX Tr. 80–82 (testimony of Mr. Aguirre); IX Tr. 108 (testimony of Dr. Onesimo Hernandez, a member of the C.C.A. slating board); IX Tr. 155–156 (testimony of City Manager George Schrader); X Tr. 182 (testimony of plaintiffs' expert Dan Weiser); X Tr. 230–231 (testimony of School Board Member Roberto Medrano).

[12] IX Tr. 29 (testimony of Mayor pro tem Allen); IX Tr. 112 (testimony of Dr. Onesimo Hernandez). No witness suggested that C.C.A. might slate a Mexican-American for Mayor.

[13] IX Tr. 104–106 (testimony of Dr. Onesimo Hernandez). Dr. Hernandez is the only C.C.A. representative who testified.

[14] IX Tr. 112 (testimony of Dr. Hernandez); IX Tr. 126–127 (testimony of Mayor Wise); X Tr. 102–103, 113 (testimony of Mr. Weiser).

[15] IX Tr. 82 (testimony of Councilman Aguirre); IX Tr. 155–158 (testimony of City Manager Schrader).

[16] IX Tr. 88 (testimony of Councilman Aguirre).

ents;[17] and that the goal of Mexican-Americans was to achieve representation on the City Council without incurring political obligations to slating groups such as C.C.A.[18]

On February 8, 1975, at the conclusion of the remedy hearing, the district court announced in an oral opinion that it accepted the City's plan (XI Tr. 83–105). The court recognized that exclusive use of single-member districts was the "preferred" approach (XI Tr. 91) but held that retention of three at-large seats was justified for two reasons. First, the court concluded that "the 8–3 system affords a greater opportunity and potential possibility for the Mexican-American population to participate in the political system of Dallas * * *" (XI Tr. 92). Referring to plaintiffs' proposed eleven-district plan, the court stated: "[I]f we move from a total at-large system to a total single member district, then we are diluting the potential on the part of the Mexican-American to participate in the political process of Dallas" (XI Tr. 94–95). As a second justification for allowing three at-large seats, the court found a legitimate governmental interest in preserving a city-wide view on issues that affect the City as a whole. In the court's words, "such matters as bond issues, zoning, city planning, [and] parks, all * * * require a look from an overall perspective from some representation on the City Government."

[17] IX Tr. 158 (testimony of City Manager Schrader).

[18] IX Tr. 88 (testimony of Councilman Aguirre); IX Tr. 111–112 (testimony of Dr. Hernandez).

"[The 8–3 plan would] giv[e] stabilization to the city in offsetting and helping to prevent sectional interests" (XI Tr. 99, 95). Accordingly, the court held that the City's plan was constitutional (XI Tr. 87, 101).

In the course of its oral opinion of February 8, 1975, the district court ordered "that the election scheduled for April of this year will proceed and elect the City Council for this year under the City Plan of 8–3 that has been presented to this Court" (XI Tr. 86). The court retained jurisdiction "to oversee any ramifications of this over the next several months or however long a period is necessary" (*ibid.*). The court also stressed that "the City of Dallas is the Legislative body. They can change this next month or next year. * * * [T]hey can alter these districts as they see fit" (XI Tr. 89). The court entered no written order.

On February 10, 1975, two days *after* the court's oral opinion, the Dallas City Council passed Ordinance No. 14,800, which provides in part: [19]

> Section 2. As a result of the decision of the United States District Court for the Northern District of Texas in the case of *Albert L. Lipscomb, et al.* v. *Wes Wise, et al.*, CA 3–4571–E, and this Ordinance enacted pursuant thereto, only the qualified voters residing within Districts 1, 2, 3, 4, 5, 6, 7 and 8 shall be eligible to vote for a candidate for Member of Council, Place Numbers 1, 2, 3, 4, 5, 6, 7 and 8, respectively. Every qualified voter of the City shall, in addition, be eligible to vote for a candidate for Place Numbers 9, 10 and 11.

[19] This portion of Ordinance No. 14,800 is reproduced in undated form in Pet. App. A–2, Pet. Br. 4, and App. 189. A certified copy of the full dated ordinance has been lodged with the Clerk of this Court.

The District boundaries specified in this ordinance corresponded to the revised plan submitted to and approved by the district court two days earlier.

On March 25, 1975, the district court issued a written opinion in which it elaborated upon its earlier oral findings concerning both liability and remedy (App. 121–148). The court indicated that on February 8, 1975, it had "ordered that the eight/three plan as had been offered by the city, be instituted in time for the April 1975 city council elections, and that the election proceed on the scheduled date" (App. 147). Reiterating its earlier conclusion, the court stated that Mexican-Americans in Dallas "benefit to a significant extent from at-large voting" because they "have to some degree entered into the policy-making structure of the C.C.A. and other slating groups * * *" (App. 139–140). While the court noted that Mexican-Americans had in the past suffered some restrictions of access to the political process, it explicitly found that "this restriction does not amount to present dilution" (App. 138). The court also repeated its earlier observation that the City Council was free to draw different district lines after the April 1975 election (App. 144 n. 20). Again, however, the court did not issue a written order.[20]

[20] The section of the court's written opinion entitled "Order" deals only with respondents' motions for attorney's fees and costs (App. 148–152).

On April 1, 1975, the Dallas City Council election was held under the "eight/three" plan. Two blacks and nine whites were elected (App. 153–163). The black Council members were elected from the two predominantly black districts. Mr. Aguirre, the incumbent Mexican-American Council member, was slated by C.C.A. for one of the at-large places, but he was soundly defeated in the city-wide vote by a white opponent (App. 154, 159). On the basis of these results, the plaintiffs and intervenors filed motions for further relief (App. 153–156, 164–165). It does not appear that the district court ruled specifically on these motions; but on May 22, 1975, the district court entered a written judgment granting "in all respects" "the relief set forth in the Court's memorandum opinion of March 25, 1975" (App. 3). Timely notices of appeal were filed in June 1975 (*ibid.*).

During the pendency of the appeals, Texas became subject to the preclearance requirements of the Voting Rights Act of 1965. On August 6, 1975, the President signed into law the Voting Rights Act Amendments of 1975, 89 Stat. 400. And on September 18, 1975, the Attorney General and the Director of the Census certified that Texas meets the requirements of Section 4(b) of the Act, as amended, 42 U.S.C. (and Supp. V) 1973b(b). 40 Fed. Reg. 43746. As a consequence, under Section 5 of the Act, Dallas may not "enact or seek to administer" any election law different from that "in force or effect on November 1, 1972" without submitting the change for preclearance by the Attorney General or the District Court for the District of Columbia. See pp. 32–37, *infra*.

In April 1976, the voters of Dallas approved the "eight/three" plan that had been ordered into effect by the district court and then enacted as an ordinance by the City Council. When passed by the voters, the "eight/three" plan became part of the City Charter (Pet. Br. 5). Neither the ordinance nor the Charter amendment has been submitted for preclearance to the Attorney General or to the District Court for the District of Columbia.[21] The April 1977 City Council election was held under the "eight/three" plan.

On May 9, 1977, the court of appeals reversed (App. 168–177; 551 F. 2d 1043). Relying primarily on *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, the court of appeals held that, absent exceptional circumstances, court-ordered relief could utilize only single-member districts. The court of appeals rejected the proposition that some at-large seats on the City

[21] On October 10, 1975, Dallas submitted for preclearance a request to hold a special election in District No. 6 to fill a vacancy caused by a resignation. The City stated: "In making this submission, we are not requesting any determination as to the total system of representation of the City Council of the City of Dallas, but simply to determine whether the Department has any objection to our holding the special election to allow the individuals in District No. 6 to be represented *while the other issues are being considered at a later time*" (emphasis added). On November 14, 1975, the Attorney General stated that he had no objection to the special election to fill the vacancy in District No. 6. (The submission and no-objection letters have been lodged with the Clerk, and copies have been sent to the parties.)

On February 10, 1976, Dallas sought preclearance from the Attorney General "to hold a special election on April 3, 1976, to fill two vacancies in at-large positions on the City Council created by resignations which occurred on January 30, 1976, and February 2, 1976." The City also stated that "propositions to amend the City Charter will be presented at the election." However, the propositions specified in the submission did not relate to any ap-

Council should be retained in order to strengthen the voting power of Mexican-Americans. In the first place, said the court, "there has never been a determination that [Mexican-American access to the political process] has been constitutionally impaired" (App. 174). Secondly, the court of appeals pointed to the results of the April 1975 election and expressed skepticism that Mexican-Americans would in fact benefit from the "eight/three" plan (App. 175–176). The other justification advanced by the district court, namely, the desirability of some city-wide representation, was not addressed by the court of appeals. The court also did not address respondents' contention [22] that the City's enactment of the court-approved "eight/three" plan was ineffective because the City had not obtained the necessary preclearance under the Voting Rights Act of 1965. Finally, and without explanation, the court of appeals stated that the Mayor could be elected by city-wide vote.[23] Timely petitions for rehearing were denied (App. 178).

The court of appeals' mandate was stayed by Mr. Justice Powell on August 30, 1977 (App. 181–187).

INTRODUCTION AND SUMMARY OF ARGUMENT

Five years ago, this Court unanimously held that the at-large method of electing Texas state legislators

portionment system for electing Council members; and, in particular, the submission did not state that the "eight/three" plan would be submitted to the voters. On April 19, 1976, the Attorney General stated that he had no objection to the special elections and propositions specified in the submission. (The submission and no-objection letters have been lodged with the Clerk, and copies have been sent to the parties.)

[22] See Brief for Plaintiff-Appellants 35–38.

[23] Respondents have not cross-petitioned from this ruling. See note 26, *infra*.

from Dallas unconstitutionally diminished the voting strength of black persons in that City. *White* v. *Regester,* 412 U.S. 755, 765–767. The district court in this case applied the principles of *White* and concluded that the at-large system of electing all eleven members of the Dallas City Council resulted in similar unconstitutional dilution of black votes. Petitioners do not dispute the correctness of that ruling. The only question now presented concerns the legality of the City's reapportionment plan, which provides for the election of eight Council members from single-member districts but retains three at-large seats.

That plan was originally proposed by the City Council itself in response to an invitation from the district court. On February 8, 1975, over respondents' objections, the court accepted the City's plan and ordered it into effect for the April 1975 Council elections. Two days later, the City Council passed an ordinance embodying the terms of the district court's order, and, in April 1976, this ordinance was formally enacted as a Charter amendment by the voters of Dallas.

The appropriate standard governing judicial review of a reapportionment plan depends on whether that plan has been ordered into effect by a court or has been enacted by the voters or their duly elected representatives. Legislatively enacted plans are constrained only by constitutional bounds, *Burns* v. *Richardson,* 384 U.S. 73, 85; court-ordered plans must also comply with federal remedial requirements that greatly restrict the use of at-large elections. See, *e.g., Connor* v. *Finch,* 431 U.S. 407, 415; *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, 639.

One additional factor comes into play when a reapportionment plan has been adopted by the voters or a legislature. That factor is the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U.S.C. (and Supp. V) 1973 *et seq.* In areas covered by Section 4 of the Act, legislative changes in the apportionment of state or local legislative bodies cannot be implemented unless precleared under Section 5 of the Act. *Connor* v. *Waller*, 421 U.S. 656; *United States* v. *Board of Commissioners of Sheffield, Alabama*, No. 76–1662, decided March 6, 1978. Texas has been covered by Section 4 of the Act since September 18, 1975. See p. 14, *supra*.

The district court erred in ordering a reapportionment plan for the Dallas City Council that involved the retention of three at-large seats. The court failed to comply with the repeated holdings of this Court that single-member districts are to be preferred in court-ordered reapportionment plans in the absence of unusual circumstances. See, *e.g.*, *Connor* v. *Finch, supra; East Carroll Parish School Board* v. *Marshall, supra; Chapman* v. *Meier;* 420 U.S. 1, 19; *Mahan* v. *Howell,* 410 U.S. 315, 333. This principle is particularly compelling in a case like this one, where the previously existing apportionment has been found constitutionally infirm because at-large elections have diminished the impact of black voters.

No special circumstances justifying court-ordered at-large elections are present here. The district court's stated justifications for its endorsement of the "eight/three" plan are inadequate. The desire to maintain a city-wide perspective on the City Council is not a special circumstance and is, in any event, an inadequate

reason to countenance the continuing dilution of black voting strength. Retention of three at-large seats also cannot be explained in terms of its potential beneficial effect on Mexican-American voters. The district court expressly found that Mexican-Americans in Dallas have not suffered any constitutional injury, and therefore no remedy directed toward Mexican-Americans is necessary. And there is no indication that preservation of three at-large places on the City Council will in fact increase the voice of Mexican-Americans. Indeed, to the extent evidence is available, it indicates the contrary.

Finally, the district court's error in accepting the reapportionment plan proposed by the Dallas City Council and rejecting the alternative plans offered by respondents was not obviated by the subsequent enactment of the "eight/three" plan as a Charter amendment. Neither the ordinance adopted by the Council itself two days after the district court's order nor the 1976 Charter amendment adopted by the Dallas voters was submitted for preclearance under Section 5 of the Voting Rights Act. Such preclearance is required even when a legislatively enacted plan adopts the terms of an earlier court order. *Connor* v. *Waller*, 421 U.S. 656. The failure to obtain the required preclearance renders the Charter amendment ineffective, and accordingly this Court need not consider the constitutional validity of that measure.

In these circumstances, the court of appeals properly concluded that respondents were entitled to the relief they sought, *i.e.*, election of all City Council

members (except perhaps the Mayor) from single-member districts. Its judgment therefore should be affirmed.

ARGUMENT

At issue in this case is a court-ordered reapportionment plan subsequently enacted by the Dallas voters as an amendment to the City Charter. The standards for reviewing court-ordered plans and legislatively enacted plans differ. The former must conform to both constitutional requirements and the federal law of remedies. See, *e.g., Connor* v. *Finch,* 431 U.S. 407, 409, 415. The latter need satisfy only the Constitution. See, *e.g., Burns* v. *Richardson,* 384 U.S. 73. In areas covered by Section 4 of the Voting Rights Act of 1965, 79 Stat. 438, as amended, 42 U.S.C. (and Supp. V) 1973b, legislatively enacted reapportionment plans must pass an additional test. They must be precleared under Section 5 of the Act, 42 U.S.C. (Supp. V) 1973c, by submission to the Attorney General or by suit in the District Court for the District of Columbia. Plans that should be but have not yet been precleared are of no force or effect. *Connor* v. *Waller,* 421 U.S. 656.

In ordering a reapportionment plan under which some City Council members would be elected at-large, the district court departed from remedial principles established by this Court and thus deprived respondents of relief to which they were entitled. When later approved by the Dallas voters, the plan should have been submitted for preclearance under Section 5 of the Voting Rights Act. It has not been so submitted and is therefore of no effect. Respondents remain entitled to the relief they sought in the district court and, accordingly, the decision of the court of appeals should be affirmed.

I. THE DISTRICT COURT ERRED IN ORDERING A REAPPORTIONMENT PLAN UNDER WHICH THREE MEMBERS OF THE DALLAS CITY COUNCIL WOULD BE ELECTED AT-LARGE

This Court has repeatedly held that a court-ordered remedy for malapportionment must comply with both constitutional requirements and appropriate federal remedial principles. *Connor* v. *Finch, supra; East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636; *Chapman* v. *Meier,* 420 U.S. 1; *Mahan* v. *Howell,* 410 U.S. 315; *Connor* v. *Williams,* 404 U.S. 549; *Connor* v. *Johnson,* 402 U.S. 690. In particular, "single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result." *Connor* v. *Finch, supra,* 431 U.S. at 415. This stringent standard applies even when a court decides to order into effect a plan originally proposed by a legislative body. *East Carroll Parish School Board* v. *Marshall, supra.*

When the district court accepted the City's plan on February 8, 1975, this case was procedurally indistinguishable from *East Carroll:* an existing apportionment system had been found unconstitutional, and, at the court's invitation, the local government had proposed a remedial plan. In these circumstances, the district court should have applied settled remedial principles and refused to order at-large elections

"[a]bsent particularly pressing features calling for multimember districts." *Chapman* v. *Meier, supra,* 420 U.S. at 19. *Chapman* was decided on January 27, 1975, and in delivering its oral opinion the district court specifically referred to this Court's ruling several days before (XI Tr. 84–85; see also App. 136). The district court also expressed awareness of the general preference for single-member districts (XI Tr. 91; see also App. 137, 146, 147). The court nevertheless approved the retention of three at-large seats on the Dallas City Council because it reviewed the reapportionment plan proposed by the Council as if it had been a legislatively enacted plan. See XI Tr. 84–85, 87, 89, 101; App. 136, 146–147. This was error.

The fact that a given plan has been designed by a legislative body is not dispositive when the effectiveness of the plan depends upon a court order. *East Carroll Parish School Board* v. *Marshall, supra*;[24] *Wallace* v. *House,* 538 F. 2d 1138 (C.A. 5) (on remand), certiorari denied, 431 U.S. 965. The plan in this case had not been formally enacted by the Council when it was submitted to the district court; moreover, under the Texas Constitution (Art. XI, § 5), the Council does not have the authority to alter its own apportionment, even if it wishes to do so. Under *East Carroll*, the district court should have accepted the

[24] In fairness to the district court, it should be noted that *East Carroll* was not decided until March 8, 1976. This Court there explicitly held for the first time that the established federal remedial principles governing court-ordered plans apply to such plans proposed but not enacted by a legislative body.

City's plan and ordered it into effect only if at-large election of three Council members was justified by a "singular combination of unique factors" such as that presented in *Mahan* v. *Howell, supra,* 410 U.S. at 330–333 (district court, operating under severe time pressure, combined three single-member districts into one multimember district in order to alleviate malapportionment caused by inaccurate census data on actual residences of Naval personnel "home-ported" at Norfolk, Virginia).

No such special circumstances are involved in this case. The considerations that motivated the district court to endorse the retention of at-large elections in Dallas are not sufficiently compelling to outweigh the continued dilution of black voting strength that the City's plan would entail. One of these considerations, the desirability of maintaining a city-wide viewpoint on the Council, simply restates a common argument in favor of at-large elections. It does not qualify as a "unique factor" justifying departure from the preferred single-member district system.[25] If court-ordered reapportionment plans could use at-large elections whenever they might serve a reasonable purpose, little would be left of this Court's insistence that single-member districts be used in the absence of "unusual circumstances" (*East Carroll Parish School Board* v. *Marshall, supra,* 424 U.S. at 639). And, in

[25] Similarly, this Court's requirement of a "singular combination of unique factors" will not be satisfied merely by a showing that multimember districts are supported by a state's historical practices. See *Connor* v. *Finch, supra,* 431 U.S. at 415.

any event, representation of a city-wide perspective on the Council is not more important than elimination of unconstitutional racial dilution.[26]

The other factor stressed by the district court is the need to prevent improper diminution of the voting strength of Mexican-Americans in Dallas. Protection of identifiable minorities' access to the political process is a goal that governments may legitimately pursue in drafting reapportionment plans. See *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 167–168 (plurality opinion). But, on the basis of this record, the court of appeals correctly concluded that such an objective cannot justify retention of three at-large seats on the Dallas City Council.

First, the district court found that Mexican-Americans in Dallas had not suffered unconstitutional dilution (App. 138). At-large seats are thus not required in order to remedy a constitutional violation (App. 174–175). Nor would the constitutional rights of Mexican-Americans be endangered by the election of all Council members from fairly drawn single-member districts. *United Jewish Organizations* v.

[26] One of the alternative plans that respondents proposed to the district court provided for at-large election of the Mayor. The court of appeals held that this was appropriate, and respondents have not cross-petitioned. Accordingly, this case does not present the question whether reservation of one at-large seat for the Mayor may be justified on the grounds that that official should represent all of the City's voters and that the dilutive effect of having one of eleven Council members elected at-large is *de minimis*. See *Wallace* v. *House*, 515 F. 2d 619 (C.A. 5), vacated, 425 U.S. 947, on remand, 538 F. 2d 1138 (C.A. 5), certiorari denied, 431 U.S. 965.

Carey, supra, 430 U.S. at 166–168 (plurality opinion).[27]

Second, although the district court determined that Mexican-American voters would benefit from the retention of three at-large seats, that conclusion is not sufficiently supported by the court's findings to justify departure from the normal remedial principle. The district court relied on the following features of the local political situation: Mexican-Americans comprise only 8 percent of Dallas's population and are dispersed throughout the City; without doubling the size of the City Council, it is impossible to construct a single-member district in which Mexican-Americans would form a majority; under the exclusively at-large system that prevailed in Dallas before 1975, two Mexican-Americans were endorsed by the C.C.A. slating group and elected to the Council, one in 1971 and one in 1973; no Mexican-American has been elected to the Council without C.C.A. endorsement, and C.C.A. probably will not endorse a Mexican-American in a single-member district.

From this evidence, the district court concluded that "at-large voting * * * allow[s] greater participation in the political processes * * * for Mexican-American voters," because they "have to some degree entered into the policy-making structure of the C.C.A. and other slating groups * * *" (App. 140). But the

[27] There is no contention in this case that any proposed plan is gerrymandered against Mexican-Americans. Such gerrymandering would be difficult to accomplish because the Mexican-American population of Dallas is scattered throughout the City.

district court also found (App. 134; VIII Tr. 6–9) that the predilections of these slating groups and their prominent role in Council elections had contributed to the unconstitutional dilution of black voting strength. The fact that C.C.A. has in the past endorsed two Mexican-American candidates does not counsel approval of a reapportionment plan that would perpetuate minority dependence on the largesse of C.C.A. or some other slating group.[28] As the district court itself recognized (App. 134), "[m]eaningful participation in the political process must not be a function of grace, but rather is a matter of right." *Graves* v. *Barnes,* 343 F. Supp. 704, 726 (W.D. Tex.), affirmed in relevant part *sub nom. White* v. *Regester,* 412 U.S. 755.

Moreover, events in the wake of the district court's order have belied the court's assessment of the advantages that continued at-large voting would confer on Mexican-Americans. When eleven at-large seats were available, it was not surprising that C.C.A. eventually decided to endorse a Mexican-American, and that some white voters, casting eleven votes, gave one to a Chicano selected and endorsed by the domi-

[28] Under the single-member plans that respondents presented to the district court, District No. 2 would be either 22% or 28% Mexican-American and would not have a majority racial group (see notes 7 and 8, *supra*). The prospects for election of a Mexican-American in this district would seem greater than in the City as a whole, where Mexican-Americans comprise only 8% of the population. Mexican-Americans in District No. 2 would constitute a swing vote and could form coalitions with either whites or blacks. C.C.A., however, appears unwilling to endorse a Mexican-American in a single-member district election.

nant slating group. The situation is markedly different under the "eight/three" plan, when only three Council members are elected at-large and one of them is the Mayor. To benefit from this arrangement, a Mexican-American candidate must be endorsed by C.C.A. for one of the two at-large seats other than the Mayor's [29] and then must receive a city-wide majority vote in the face of racial bloc voting. In the April 1975 election, the incumbent Mexican-American Council member was endorsed by C.C.A. for an at-large seat, but he was soundly defeated by a white opponent (App. 154, 159). This result prompted the Mexican-American intervenors in this litigation to move for further relief in the district court (App. 164–165) and to state categorically that "At Large voting does not offer features which allow greater participation in the political process within Dallas for Mexican-American voters, but in fact dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate meaningful in the election process" (*ibid.*).

The inadequacy of the district court's justifications for the retention of at-large voting and petitioners' failure to identify any compelling governmental interest in support of the "eight/three" plan are particularly decisive in this case where the need for reapportionment arose precisely because the district court found that black voting strength had been unconstitutionally diluted by at-large elections. The

[29] C.C.A. endorsement of a minority candidate for Mayor does not appear to be a realistic possibility. See note 12, *supra.*

numerous cases in which this Court has expressed a preference for the use of single-member districts in court-ordered plans all involved apportionment schemes that were held unconstitutional because they departed from the one-person, one-vote rule.[30] The Court's admonition that court-ordered remedial plans should use only single-member districts reflected concern about the *potential* undesirable consequences of multimember districting. In particular, in *Connor* v. *Finch, supra,* 431 U.S. at 415, the Court voiced the fear that multimember districts might "tend to submerge electoral minorities and overrepresent electoral majorities * * *." That fear was realized in this case. In fashioning its remedy, the district court should have avoided at-large voting not only because this Court has instructed it to do so, but also because at-large voting was the source of the very violation the district court was seeking to eliminate. As this Court has stated in a different context, "the nature of the * * * remedy is to be determined by the nature and scope of the constitutional violation." *Milliken* v. *Bradley,* 433 U.S. 267, 280.

Upon finding that the use of at-large elections had produced unconstitutional racial discrimination, the district court's duty was "to render a decree which [would] so far as possible eliminate the discriminatory effects of the past as well as bar like discrimina-

[30] The exclusively at-large election system prevailing in Dallas before 1975 was not challenged on the ground that it violated the one-person, one-vote principle; indeed, it is difficult to see how a purely at-large apportionment could be attacked on that basis.

tion in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154. This duty is not fulfilled by a decree under which three Council members are elected at-large. The same factors that were found at the liability stage to minimize black electoral participation (*i.e.,* racial bloc voting, the history of *de jure* discrimination, and the power of white-dominated slating groups) will presumably operate to dilute the voting strength of blacks for three at-large seats.[31] The district court's decree, therefore, did not adequately ensure that black voters will have an equal opportunity with white voters "to participate in the political processes and to elect legislators of their choice" (*White* v. *Regester,* 412 U.S. 755, 766).

One final point remains to be made about the district court's order. It applied only to the April 1975 City Council election. When the court accepted the City's proposed reapportionment plan, it explicitly ordered the plan into effect for "the election scheduled for April [1975] * * *" (XI Tr. 86). The directive was repeated several weeks later in the court's written opinion (App. 147). On neither occasion did the court indicate that its order would govern any election other than the one that was about to occur. The "eight/three" plan was devised, submitted, and approved under substantial time pressure, and was intended by the court as a temporary measure to guar-

[31] When a district court must formulate a remedy for racial discrimination, the force of proof presented at the liability stage "does not dissipate at the remedial stage of the trial." *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 361–362.

antee the constitutionality of the imminent Council election. This conclusion is reinforced by the court's repeated references to the possibility that Dallas might wish to change the plan in the near future (XI Tr. 89, 101). It is also confirmed by the City's belief that the court's order was of finite duration and that a legislative enactment was necessary to perpetuate the "eight/three" scheme. This belief is evidenced by the Council's enactment of the plan as an ordinance two days after the court's oral approval, and by the submission of the plan to a referendum of the Dallas voters in April 1976, so that it could be approved as a Charter amendment pursuant to state law.

Moreover, even if the district court may have intended its order to operate beyond April 1975,[32] the order by its terms refers only to the election conducted at that time. Under the specificity requirements of Rule 65(d), Fed. R. Civ. P., a district court must frame its orders so that the parties and appellate courts "will know what the court intends to require and what it means to forbid." *International Long-*

[32] The district court stated that it would retain jurisdiction "to oversee any ramifications of this over the next several months or however long a period is necessary" (XI Tr. 86). Also, in granting the City's request to modify certain Charter requirements for signatures on nominating petitions, the court provided that "[t]his modification [will be effective] for the April 1975 election only" (App. 147–148). This latter comment may be read either as support for the proposition that no part of the district court's order was intended to apply beyond April 1975 or as an indication that, with the exception of the modification of signature rules, the court-ordered reapportionment plan would govern indefinitely (since the court-ordered plan could be operated without this modification).

shoremen's Assn. v. *Philadelphia Marine Trade Assn.*, 389 U.S. 64, 76. See *Schmidt* v. *Lessard*, 414 U.S. 473.[33] An important element of Rule 65(d) is that the intended duration of an injunction must be prescribed by the district court and not left to speculation. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 of Alameda County*, 415 U.S. 423, 444. The district court's order here seemingly applies only to the April 1975 election, and should be so construed under Rule 65(d).

The fact that the "eight/three" plan, as approved and ordered into effect by the district court, controlled only the April 1975 election does not render respondents' challenge to the district court's decision moot. In their complaint, respondents sought a permanent injunction barring Council elections until "the City of Dallas is redistricted into individual member voting districts" (App. 11). The district court denied that relief, and the question whether the denial was error is not moot—unless, in the interim, Dallas has adopted a valid reapportionment plan for its City Council. As the remaining portion of this brief demonstrates, it has not.

[33] Rule 65(d) is designed to serve two functions—to give fair notice to parties who may be subjected to contempt proceedings for alleged violations of an injunction, and to ensure informed appellate review. *Schmidt* v. *Lessard*, *supra*, 414 U.S. at 476–477. The second function is directly relevant here. If the duration of a district court's order were determined by inferences and guesswork, rather than by express language, it would be "impossible for an appellate tribunal to know precisely what it is reviewing." *Id.* at 477.

II. THE 1976 CHARTER AMENDMENT IS INEFFECTIVE BECAUSE IT HAS NOT BEEN PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

Although the lower courts did not rule on the consequences of the failure to submit the 1976 Charter amendment for preclearance under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. (Supp. V) 1973c, that issue was raised by respondents before the court of appeals[34] and is properly before this Court as a basis for affirmance. See, *e.g., United States* v. *New York Telephone Co.,* No. 76–835, decided December 7, 1977, slip op. 6 n.8; *Massachusetts Mutual Life Ins. Co.* v. *Ludwig,* 426 U.S. 479; *Langnes* v. *Green,* 282 U.S. 531, 535–539. The issue should be resolved here rather than remanded to the lower courts. See *Perkins* v. *Matthews,* 400 U.S. 379, 386–387. The facts necessary for an appropriate disposition are in the record, and the governing legal principles are well-established.

Since September 18, 1975, Texas has been covered by Section 4 of the Voting Rights Act, 79 Stat. 438, as amended, 42 U.S.C. (and Supp. V) 1973b.[35] See *Bris-*

[34] See p. 16, *supra.* Plaintiffs could not have raised the Section 5 issue before the district court because Section 5 did not apply to Texas until the case was pending on appeal. See p. 14, *supra.*

[35] As originally enacted in 1965, Section 4 applied to any state or political subdivision for which (1) the Attorney General has determined that on November 1, 1964, it maintained a "test or device," and (2) the Director of the Census has determined that less than 50% of its voting-age residents were registered for, or voted in, the presidential election of November 1964. The phrase "test or device" was defined to include the following requirements for registration or voting: literacy and educational achievement tests; good moral character requirements; and voucher systems. See 42 U.S.C. 1973b(c); *South Carolina* v. *Katzenbach,* 383 U.S. 301, 317–318. When the Act was reenacted, as amended, in 1970, the coverage formula of Section 4 was expanded to include November 1968 voting and registration results; the definition of "test or device" in Section 4(c) was retained. 84 Stat. 315.

In Texas, less than 50% of the voting-age population voted in the presidential elections in 1964 and 1968. Until 1975, however, Texas was not covered by Section 4 because it did not use a "test or device" for registration or voting as defined in Section 4(c). See H.R. Rep. No. 94–196, 94th Cong., 1st Sess. 17 (1975); S. Rep. No. 94–295, 94th Cong., 1st Sess. 25 (1975). When the Act was reenacted, as amended, in 1975, the definition of "test or device" in Section 4(c) was expanded to include the use of English language registration or voting materials in any state or political subdivision in which the Director of the Census has determined that more than 5% of the voting-age citizens are members of a single language minority. 89 Stat. 400–402. The House and Senate Committees which drafted this legislation stated that this change was principally designed to bring Texas within the preclearance requirements of Section 5 because of that State's long history of voting discrimination against blacks and Mexican-Americans. H.R. Rep. No. 94–196, *supra,* at 17–22; S. Rep. No. 94–295, *supra,* at 25–30. Of particular concern to Congress were at-large election systems in Texas which diluted the voting strength of blacks and Mexican-Americans. H.R. Rep. No. 94–196, *supra,* at 19–20; S. Rep. No. 94–295, *supra,* at 27–28. See also Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 (Extension of the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 461–462 (statement of Dr. Charles L. Cotrell); *id.* at 234 (statement of Representative Barbara Jordan) (1975).

coe v. *Bell,* 432 U.S. 404. Accordingly, under Section 5 of the Act, the City of Dallas cannot "enact or seek to administer" a reapportionment plan "different from that in force or effect on November 1, 1972" without first obtaining preclearance from the Attorney General or the District Court for the District of Columbia. See *United*

States v. *Board of Commissioners of Sheffield, Alabama,* No. 76–1662, decided March 6, 1978; *Georgia* v. *United States,* 411 U.S. 526. Until such preclearance is obtained, the 1976 Charter amendment has no force or effect.[36] *Connor* v. *Waller,* 421 U.S. 656; *Morris* v. *Gressette,* 432 U.S. 491, 497 n. 8. This is true notwithstanding the fact that the amendment adopts the "eight/three" plan approved by the district court.

Connor v. *Waller, supra,* holds that in a state covered by Section 4 of the Act, a legislatively-enacted reapportionment plan is subject to the preclearance requirements of Section 5 even if enacted during reapportionment litigation. The facts of *Waller* are almost identical to those presented here. In 1975, the Mississippi legislature reapportioned both of its houses through the enactment of two state laws. With respect to 81 of Mississippi's 82 counties, these laws adopted the exact details of federal district court reapportionment orders;[37] in the remaining county the laws adopted a district court order with a slight modification.[38] A three-judge district court then sustained the constitutionality of the legislation, relying heavily on the fact that the new laws embodied earlier court-ordered plans. *Connor* v. *Waller,* 396 F. Supp. 1308 (S.D. Miss.). This Court summarily reversed, holding that the district court should not have reached the constitutional challenges to the Mississippi Acts because those Acts were not and would not be "effective as laws until and unless cleared pursuant to § 5 [of the Voting Rights Act of 1965]." *Connor* v. *Waller,* 421 U.S. 656. There is no suggestion in the Court's opinion that the reversal was based on the difference in one minor detail between the legislative enactments and the court orders upon which they were modeled.

Even if the question were an open one, there are strong reasons for concluding that the inclusive language of Section 5 covers legislative reapportionments modeled upon pre-existing court orders. A legislative enactment such as Dallas's 1976 Charter amendment does more than simply "incorporate" a federal court's order. A court can modify its order or grant additional relief upon a proper factual show-

[36] Because under the Texas Constitution (Art. XI, § 5) voter approval is necessary to effectuate a change in Dallas's election laws, the discussion in the text has been limited to the April 1976 Charter amendment. Nevertheless, the preclearance requirements of Section 5 would also apply to the February 10, 1975, ordinance. Although that ordinance was passed before Texas became subject to Section 5, the preclearance requirements cover any attempt to "enact *or seek to administer*" any election law different from that "in force or effect *on November 1, 1972.*" 42 U.S.C. (Supp. V) 1973c (emphasis added). See *Perkins* v. *Matthews,* 400 U.S. 379, 394–395.

[37] The 1975 Mississippi legislation provided that 79 of the state's counties would be reapportioned according to the precise terms of the 1971 district court order in *Connor* v. *Johnson,* 330 F. Supp. 506 (S.D. Miss.), which governed the 1971 legislative elections. See *Connor* v. *Waller,* 396 F. Supp. 1308, 1309–1310, 1316–1317, 1332. In two other counties, the 1975 legislation adopted the terms of federal district court reapportionment orders relating specifically to those counties. See *id.* at 1317.

[38] The 1975 Mississippi legislation adopted a federal district court reapportionment order relating to Jackson County but combined a small adjacent county (George) for the purpose of electing representatives at-large. See *id.* at 1318–1319.

ing.[39] In this case, for example, respondents could argue that the results of elections held since the order was issued undercut the court's finding that Mexican-Americans would benefit from the City's proposed plan. But if the plan is enacted as legislation, modification is substantially more difficult; respondents would bear the burden of proving that the legislation is unconstitutional. Because such legislation adopting a court-ordered plan has consequences broader than the court order itself, the legislation should be subject to preclearance under Section 5. Only existing and binding court-ordered reapportionment plans should be exempt from the inclusive language of Section 5. *Connor* v. *Johnson,* 402 U.S. 690; *Morris* v. *Gressette, supra,* 432 U.S. at 497 n. 8; *East Carroll Parish School Board* v. *Marshall, supra,* 424 U.S. at 638-639, n. 6.

In sum, the Charter amendment is not effective as law because it has not been submitted for preclearance under Section 5.[40] The amendment therefore cannot provide authority for the conduct of Dallas City Council elections. Nor are those elections any longer governed by the district court's 1975 order (see pp. 29–31, *supra*). Regardless of the status of that order, however, the court of appeals correctly determined that the district court's decision improperly departed from remedial principles established by this Court and thereby deprived respondents of relief to which they were entitled. Single-member districts remain the preferred mechanism for court-ordered reapportionment, and petitioners have not identified any valid reason why that preference should not be followed in this case.

[39] See, *e.g, Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 437–438; *System Federation* v. *Wright*, 364 U.S. 642, 647–648; *United States* v. *Swift & Co.*, 286 U.S. 106.

[40] If the Charter amendment were submitted for preclearance, it would be evaluated according to the standards announced in *Beer* v. *United States*, 425 U.S. 130. Because the amendment has not yet been subjected to the preclearance procedure, it is unnecessary now to determine whether the Dallas provision satisfies constitutional requirements under the Fourteenth and Fifteenth Amendments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1977

No. 77-529

WES WISE, *et al.*,

Petitioners,

v.

ALBERT L. LIPSCOMB, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law, proposed *amicus curiae* herein, respectfully seeks leave of this Court to file the attached brief in order to assist the Court in resolving the remedial questions presented in this voting rights case.

As set forth in the attached brief, the Lawyers' Committee has been intimately involved for a number of years in voting rights litigation on behalf of minority-race voters, and we have participated, both as *amicus curiae* and as the representative of parties, in many of this Court's important voting rights cases. The instant case is of particular concern to us, as it will have a bearing on the appropriate remedies to be applied in many of our cases which, like this case, involve the effect of at-large voting schemes on the participation of minority voters in the electoral process. We believe that we bring to this

case a familiarity with, and understanding of, the applicable decisions of this Court. We also bring to this case considerable experience with the practical implementation of those decisions, which may not be presented by the parties. In addition, the attached brief presents an alternative argument in support of the judgment below, based upon established principles of equitable remedies, which we do not believe will be presented by any party.

Both sets of respondents have consented to the filing of this brief, but petitioners have refused consent.

WHEREFORE, the Lawyers' Committee for Civil Rights Under Law respectfully moves that its brief *amicus curiae* be filed in this case.

March 28, 1978

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-529

WES WISE, *et al.*,

Petitioners,

v.

ALBERT L. LIPSCOMB, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure civil rights to all Americans. The Committee's membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the

Nation's leading lawyers. Through its national office in Washington, D.C., and offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, employment, education, housing, municipal services, the administration of justice, and law enforcement.

In the past, the Lawyers' Committee has filed briefs *amicus curiae* by consent of the parties or by leave of this Court in a number of important civil rights cases. The interest of the Lawyers' Committee in this case arises from its dedication to and interest in the full and effective enforcement and administration of the Nation's constitutional and statutory provisions securing the voting rights of minorities. As a result of providing legal representation to litigants in voting rights cases for the past thirteen years, the Committee has gained considerable experience and expertise in problems of racial discrimination relating to the voting rights of minority citizens, and in the requirements and guarantees of the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. Attorneys associated with the Lawyers' Committee represented the minority plaintiffs in two of the first four cases to reach this Court on the scope of the requirements of § 5 of the Voting Rights Act of 1965, *Fairley* v. *Patterson* and *Bunton* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), and have provided continuing representation since 1970 to the plaintiff voters in the Mississippi state legislative reapportionment case, in which this Court has rendered five decisions in this decade, the latest of which was *Connor* v. *Finch*, 431 U.S. 407 (1977). The Committee also represented the minority voters in *City of Richmond* v. *United States*, 422 U.S. 358 (1975); and, we filed *amicus* briefs in *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976), and *Georgia* v. *United States*, 411 U.S. 526 (1973).

In this case the Committee is interested in (1) the continued viability of the principles announced by this Court in *White* v. *Regester*, 412 U.S. 755 (1973), that at-large elections unconstitutionally dilute minority voting strength when maintained after an extensive past history of racial discrimination affecting the voting process and when at-large voting denies to minorities equal access to the election process; (2) the proper scope and interpretation of the principle first announced in a Lawyers' Committee case, *Connor* v. *Johnson*, 402 U.S. 690 (1971), that in District Court-ordered reapportionment plans single-member districts are preferred absent unusual circumstances; and (3) the proper remedies in a case in which at-large voting has been held unconstitutional for dilution of minority voting strength. In addition, attorneys associated with the Jackson, Mississippi office of the Lawyers' Committee currently have pending eight cases challenging at-large municipal elections and voting districts for city council members, and the decision of the Court in this case on the scope of a proper remedy is likely to have a direct impact on the decisions in those cases.

Because of our extensive and intimate involvement in voting rights cases involving state legislatures, counties, and municipalities, and our extensive knowledge of the case law in the area, we believe that we can present a perspective on this case which has not been presented by the petitioners, and which may not be presented by the respondents. First, we wish to direct the attention of the Court to, and state our understanding of, the specific cases in which the Court has defined what constitutes a "court-ordered" redistricting plan. Second, we desire to show that this Court has indicated that any exceptions to the general principle favoring single-member districts in

court-ordered plans must be narrowly construed, and are applicable only in instances in which single-member districts threaten the enjoyment of secured constitutional rights or in which there are insurmountable difficulties to the creation of single-member districts. Third, and we do not believe that this contention will be advanced by the petitioners or respondents, we submit that the proper remedy in this case must be determined by the scope of the violation, and that the nature of the violation dictates single-member districts as the only remedy which provides full and complete relief for the constitutional violation.

The Lawyers' Committee therefore files this brief as friend of the Court urging affirmance of the judgment below.

STATEMENT OF THE CASE

Plaintiffs, black voters of Dallas, Texas, filed this action in 1971 challenging the at-large, citywide election of members of the Dallas City Council for unconstitutional dilution of black voting strength. The District Court on its own motion at a hearing on a motion for preliminary injunction to enjoin the 1971 city council elections dismissed the complaint, and the Court of Appeals reversed and remanded for a trial, *Lipscomb* v. *Jonsson*, 459 F.2d 335 (5th Cir. 1972). On remand, the District Court certified the plaintiff class to consist of "all blacks residing within the corporate limits of the City of Dallas" (399 F. Supp. 782, 783-84), but denied a motion to intervene filed on behalf of Mexican-American voters while reserving to the Mexican-Americans the right to participate in the post-trial hearing on the question of relief (*id.* at 784).

According to the 1970 Census, Dallas has a population of 844,401 persons, of whom 65 percent are white (Anglo), 25 percent are black, and 10 percent are Mexican-American. Black citizens are highly segregated residentially, and are primarily concentrated in approximately 40 black-majority Census tracts in the Dallas inner city area (399 F. Supp. at 785). Mexican-Americans constitute a majority in four Census tracts, and are otherwise dispersed throughout Dallas (399 F. Supp. at 792-93).

Under the plan challenged by the plaintiffs, eleven city council members were elected at-large to a term of two years. Eight council members were required to run from eight residential districts under a "place" requirement, although elected in citywide voting, and the remaining three—including the Mayor—were required to qualify by "place" but with no district residency requirement (399 F. Supp. at 785). A majority vote was required for election (*id.*). At least since 1959, city council elections have been controlled largely by the white-dominated Citizens Charter Association (CCA), a nonpartisan slating group whose endorsed candidates have won 82 percent of the elections (*id.* at 786).

Since 1907, only two blacks have been elected to the Dallas City Council under the at-large system (*id.* at 787).[1] This, the District Court found, was a result of "the existence of past discrimination" (*id.* at 790) and "a customary lesser degree of access to the process of slating candidates than enjoyed by the white community" (*id.*). Both of the blacks elected to the city council were elected as a result of endorsement by the CCA and ran only against other black candidates (*id.* at 787). In addition, the District Court found that black residents had a "lesser degree of opportunity . . . to meaningfully participate in the election process" under the at-large system because of racially polarized voting under which "the white community, the non-minority voter tends not to

[1] At the time of trial, the Dallas City Council was composed of two blacks, one Mexican-American, and eight whites (Anglos) (399 F. Supp. at 787, n.5).

vote for the black candidates" (*id.* at 790). The District Court's analysis of five races since 1959 in which blacks ran for city council seats showed that black voters generally voted overwhelmingly for black candidates, and that white voters generally voted overwhelmingly for white candidates, in white-on-black contests (*id.* at 785-86). This current pattern of racial bloc voting, and also the high degree of residential housing segregation, the District Court found were present "lingering effects" of "past official race discrimination" (*id.* at 790). The evidence also showed that Dallas blacks living in the majority black Census tracts in the inner city area—93 percent of all blacks in Dallas—suffered deprivations and inequalities in the areas of housing, education, employment, and income (*id.* at 785).

The District Court found that in the past, the Dallas City Council had enacted ordinances requiring segregation of the races and the city council had acknowledged racial discrimination in law enforcement (*id.* at 787), but the Court held that the evidence showed that the city council was presently responsive to the interests of the minority communities (*id.* at 790-91). "This present responsiveness, however," the District Court held, "is not enough to justify the present exclusive at-large voting plan when weighed against the other factors which I have found" (*id.* at 791).

Finding that blacks in Dallas had been subjected to official past discrimination "which precludes effective participation in the electoral system" and that "black voters of Dallas do have less opportunity than do the white voters to elect councilmen of their choice" (*id.* at 790), the District Court held the all at-large system unconstitutional for dilution of black voting strength, and this holding was not challenged on appeal, *Lipscomb* v. *Wise*, 551 F.2d 1043, 1045 (5th Cir. 1977), nor is it challenged in this Court.

After striking down the all at-large scheme, the District Court afforded the parties an opportunity to present redistricting plans. The city proposed as a remedy that eight city council members be elected from districts—corresponding to the eight districts previously established for the residency requirement under the at-large system—and that three city council members, including the Mayor, continue to be elected at large (the "eight/three plan") (399 F.Supp. at 791). The city's proposal to the District Court was not submitted for Federal preclearance under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The plaintiffs offered two plans, one providing ten single-member districts and a Mayor elected at-large (the "ten/one plan"), and a second alternative plan providing for the election of all eleven members of the City Council from single-member districts, with the Mayor elected by the City Council itself (the "eleven/zero plan") (*id.*).

After a hearing on the remedy, the District Court ordered into effect for the April, 1975 city council elections (*id.* at 798) the eight/three plan proposed by the city council. Under the city's plan blacks comprised a majority of the population in only two districts (District 6, 73.60% black; District 8, 87.30% black) and Mexican-Americans lacked a majority in any district and at best constituted only 20 percent of the population in one (*id.* at 795). The District Court's preference for the city's plan was based on (1) "a consideration of the impact that any plan would have on the Mexican-American citizens of Dallas" and (2) "the legitimate governmental interest to be served by having a city-wide viewpoint on the City Council" (*id.* at 792). As to the first, the District Court reasoned that Mexican-Americans "benefit to a significant extent from at-large voting" as a result of their "swing vote" position (*id.* at 793), and thus the eight/three plan would "enhance the opportunity of the Mexican-American citizens of Dallas to utilize their

voting potential in a significant new way, while not undermining the degree of participation they have enjoyed under the exclusive at large voting plan" (*id.* at 794). As to the second, the District Court found on testimony of defendants' witnesses that the election of some council members at-large would be "desireable" [*sic*] (*id.* at 794), that "there is a legitimate governmental interest to be served by having some at-large representation on the Dallas City Council; [and] that this governmental interest is the need for a city-wide view on those matters which concern the city as a whole, e.g., zoning, budgets, and city planning . . ." (*id.* at 795).

After the 1975 city council elections in which a Mexican-American candidate was defeated for one of the at-large positions, counsel for the Mexican-Americans sought further modification of the court-ordered plan and proposed to show that far from enhancing their position, the eight/three plan "dilutes the vote of the Mexican-American citizen and makes it impossible for a Mexican-American to participate in the election process" (551 F.2d at 1048).

On appeal, the Fifth Circuit held that the remedy ordered into effect by the District Court was inadequate and the Court reversed the judgment of the District Court and remanded for a new single-member districting plan with the city having the option of electing the Mayor at-large (the ten/one plan) or by election of the city council (the eleven/zero plan). 551 F.2d 1043, 1049. The appeals court considered that the relief adopted and ordered into effect by the District Court must be judged by the standards governing court-ordered plans (551 F.2d at 1046-47), and that the particular situation of the Mexican-American citizens in Dallas did not constitute a "special circumstance" justifying a departure from the preference for single-member districts in court-ordered plans (*id.* at 1048):

> We conclude that (1) as far as this record is concerned, chicano "access" to the political processes of Dallas need not be improved since it is *ex hypothesi* the same "access" as that of white persons; and (2) the district court's opinion was based on a theory of electoral politics that applies as well if not better to single-member districts than to at-large elections. Thus, the situation of the Mexican-American voters does not constitute a special circumstance within the contemplation of the cases which require that absent such special circumstances, the city's legislative body be elected from single member districts.

On August 30, 1977, Mr. Justice Powell granted a stay of the judgment of the Court of Appeals pending disposition of the defendants' petition for certiorari, *Wise* v. *Lipscomb*, No. A-149, and on November 2, 1977 the Court denied an application for an injunction against filling one of the three at-large seats by special election, No. A-396. Defendants' petition for a writ of certiorari was granted on January 9, 1978.

SUMMARY OF ARGUMENT

This case is important because the arguments of petitioners, if accepted, would erode and undo the major holdings of this Court in *White* v. *Regester*, 412 U.S. 755 (1973), and *Connor* v. *Johnson*, 402 U.S. 690 (1971), and their progeny which were designed to end the century-long voting discrimination against minority citizens and to make the newly-gained franchise secured by the Voting Rights Act of 1965 a reality. Beginning with the earliest reapportionment cases, this Court recognized that at-large voting for public officials has a dangerous potential for minimizing and cancelling out the vote of minority citizens. In *White*—articulating criteria which petitioners concede are directly applicable here—the Court held that the Fourteenth Amendment prohibits at-large voting where it denies blacks and Mexican-Americans equal ac-

cess to the political process, and in *Connor* and its progeny the Court held that because at-large voting submerges electoral minorities, single-member districts are preferred in court-ordered plans, absent unusual circumstances. The principles developed in these cases are directly applicable here both to protect against dilution of minority voting strength and to secure the goal of *Reynolds* v. *Sims*, 377 U.S. 533, 565-66 (1964), of "fair and effective representation for all citizens."

This case presents the unusual and seemingly paradoxical question of whether some at-large voting is proper as a remedy for an all at-large voting scheme conceded to be unconstitutional for dilution of black voting strength. If the Court accepts petitioners' hypothesis, it will sanction a remedy which incorporates part of the constitutional violation!

Because the city's eight/three plan was submitted to the District Court pursuant to court order as a remedy, because the District Court ordered the eight/three plan into effect for city council elections, and because when the plan was submitted the city lacked the authority under its own Charter legislatively to enact such a plan, the Court of Appeals was correct in rejecting the city's plan as a remedy because it clearly fails to comply with the rule that in court-ordered plans single-member districts are preferred absent unusual circumstances. Under the circumstances present here, this Court has never recognized any distinction between the standards controlling "court-ordered" plans and those governing "court-approved" plans. Such a distinction would allow petitioners to circumvent both the principles governing court-ordered plans and the Federal preclearance requirements of § 5 of the Voting Rights Act of 1965, both of which were designed to prevent new forms of racial discrimination in voting. Indeed, such a radical departure from

the prior decisions of this Court would severely undermine and as a practical matter completely destroy the guarantees against racial discrimination in voting so laboriously developed in the most important voting rights decisions of this Court.

Nor are the findings of the District Court sufficient in this case to sustain an exception to the rule of preference for single-member districts in court-ordered plans. The District Court's findings regarding the Mexican-American vote are contradictory and at best ambiguous, and this Court in prior decisions has rejected the contention that the city's expressed interest for citywide representation is an "unusual circumstance" sufficient to overcome the preference for single-member districts.

Alternatively, even if the Court rejects our contention that this is a court-ordered plan governed by the single-member district rule, the city's plan must fall under the equitable principles of securing "complete justice" and adjusting remedies to grant "necessary relief." The city's plan must fail as a remedy because it includes elements of the constitutional violation. If the election of eleven city council members at-large unconstitutionally dilutes black voting strength, then the election of three city council members at-large also minimizes and cancels out black voting strength. Further, to the extent that any fairly drawn single-member district plan would include three majority black districts (as opposed to two in the city's plan), and would include districts in which the percentage of Mexican-Americans would be higher than their citywide percentage, the eight/three plan fails to place either minority group in the position they would have held but for the constitutional violation, and in fact perpetuates, rather than eradicates, the discrimination of the past.

ARGUMENT

I. ON THE FACTS OF THIS CASE, AT-LARGE MUNICIPAL ELECTIONS FOR MEMBERS OF THE DALLAS CITY COUNCIL ARE UNCONSTITUTIONAL FOR DILUTION OF BLACK VOTING STRENGTH.[2]

While at-large elections are "not per se illegal under the Equal Protection Clause," *Whitcomb* v. *Chavis*, 403 U.S. 124, 142 (1971), the Court has repeatedly held that at-large voting is unconstitutional when "designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965); *accord*, *Dallas County* v. *Reese*, 421 U.S. 477, 480 (1975); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143. In *Fairley* v. *Patterson*, decided *sub nom. Allen* v. *State Board of Elections*, 393 U.S. 544, 569 (1969), the Court in considering whether a switch to at-large elections was subject to Federal preclearance under § 5 of the Voting Rights Act of 1965 held:

> The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot. See *Reynolds* v. *Sims*, 377 U.S. 533, 555. Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.

[2] Although the city has acquiesced in the District Court's finding of unconstitutional dilution, we deem it important to address this issue to emphasize the nature of the violation as it affects the scope of the necessary remedy.

In many parts of the South—and possibly elsewhere—at-large elections "designedly or otherwise" are the last vestige of racial segregation in voting.[3] Although blacks and other minorities in the South are now permitted to register and vote in large numbers—primarily as a result of the Voting Rights Act of 1965—at-large elections which dilute minority voting strength "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting."

In *White* v. *Regester*, 412 U.S. 755, 766 (1973), *aff'g in relevant part*, *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), the Court held that at-large elections unconstitutionally dilute minority voting strength when plaintiffs have produced

> evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than

[3] WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 109-26 (1972); UNITED STATES COMMISSION ON CIVIL RIGHTS, POLITICAL PARTICIPATION 21-25 (1968); *see also* Carpeneti, *Legislative Apportionment: Multi-Member Districts and Fair Representation*, 120 U. PA.L. REV. 666 (1972); Banzhaf, *Multi-Member Electoral Districts—Do they Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966). There can be no doubt that in some instances at-large municipal elections have been instituted for purposes of discrimination, *e.g.*, *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (1962 Mississippi statute requiring switch to at-large municipal voting held unconstitutional as racially motivated). In other instances, the justification advanced is to eliminate ward politics and to promote governmental reform, but the effect on minority participation is equally discriminatory:

> In a fundamental sense, the Black American has fallen victim of governmental reform. In their zeal for efficiency, democratic government, and the elimination of corruption, the reformers have led us to new political systems which operate to the detriment of minority groups.

Sloane, *"Good Government" and the Politics of Race*, 17 SOCIAL PROBLEMS 156, 174 (1969).

> did other residents in the district to participate in the political processes and to elect legislators of their choice.

The Court in *White* held at-large voting for the Texas Legislature in Dallas County unconstitutional on a showing of (1) "the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes"; (2) Texas law "requiring a majority vote as a prerequisite to nomination in a primary election"; (3) the "so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket"; (4) since Reconstruction, only two black candidates from Dallas County has been elected to the House of Representatives, and these were the only two blacks ever slated by the white-controlled Dallas Committee for Responsible Government (DCRG); and (5) the DCRG did not require the support of black voters, and "did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community." 412 U.S. at 766-67.

The Court made similar findings with respect to Mexican-American voters in Texas. The Court found that the Mexican-American community of Bexar County (San Antonio) was effectively removed from the political processes on proof that it "had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others"; that the state poll tax and restrictive voter registration procedures had foreclosed effective political participation; and that "the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests." *Id.* at 767-69. Single-member legislative districts were required "to remedy 'the effects of past and present discrimination against Mexican-Americans' . . .

and to bring the community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activities." *Id.* at 769.[4]

White is the first case in which this Court struck down at-large voting—there in multi-member legislative districts—for unconstitutional dilution of minority voting strength, and the lower courts have applied the *White* standards to invalidate at-large elections at the county, parish, and municipal levels where the proof shows that at-large voting denies minorities equal access to the political process. *E.g.*, *Parnell* v. *Rapides Parish School Bd.*, 563 F.2d 180 (5th Cir. 1977); *Wallace* v. *House*, 515 F.2d 619 (5th Cir. 1975), *vacated and remanded on relief*, 425 U.S. 947 (1976), *on remand*, 538 F.2d 1138 (5th Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); *Perry* v. *City of Opelousas*, 515 F.2d 639 (5th Cir. 1975); *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds sub nom. East Carroll Parish*

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[4] The District Court's judgment affirmed by this Court also rested on evidence of racial bloc voting, 343 F. Supp. at 731, 732:

> The population of the West Side of San Antonio tends to vote overwhelmingly for Mexican-American candidates when running against Anglo-Americans in party primary or special elections, to split when Mexican-Americans run against each other, and to support the Democratic Party nominee regardless of ethnic background in the general elections. The record shows that the Anglo-Americans tend to vote overwhelmingly against Mexican-American candidates except in a general election when they tend to vote for the Democratic Party nominee whoever he may be although in a somewhat smaller proportion than they vote for Anglo-American candidates. * * * It is not suggested that minorities have a constitutional right to elect candidates of their own race, but elections in which minority candidates have run often provide the best evidence to determine whether votes are cast on racial lines. All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.

School Bd. v. *Marshall*, 424 U.S. 636 (1976); *Turner* v. *McKeithen*, 490 F.2d 191 (5th Cir. 1973); *Paige* v. *Gray*, 399 F. Supp. 459 (M.D. Ga. 1975), *vacated and remanded*, 538 F.2d 1108 (5th Cir. 1976), *on remand*, 437 F. Supp. 137 (M.D. Ga. 1977); *Bolden* v. *City of Mobile*, 423 F. Supp. 384 (S.D. Ala. 1976), *appeal pending*, No. 76-4210 (5th Cir.); *Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport, Louisiana*, 71 F.R.D. 623 (W.D. La. 1976), *appeal pending*, No. 76-3619 (5th Cir.). *See* Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353 (1976).

Here it is clear that the District Court properly applied the *White* v. *Regester* standards to strike down at-large municipal voting which minimized and cancelled out black voting strength. On the findings of fact made by the District Court, all of the elements which led this Court to hold unconstitutional at-large voting for the Dallas County delegation to the Texas Legislature equally were present to deny Dallas blacks equal access to the municipal voting process. Hence the District Court properly concluded that at-large municipal elections violated plaintiffs' Fourteenth Amendment rights.

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE REMEDY ORDERED BY THE DISTRICT COURT FAILED TO MEET THE REQUIREMENTS APPLICABLE TO COURT-ORDERED REDISTRICTING PLANS.

A. The Eight/Three Plan Ordered Into Effect by the District Court Was a Court-Ordered Plan.

The mixed eight/three plan was adopted by the District Court as a remedy for at-large, citywide municipal elections in this case and ordered into effect for the April, 1975 municipal elections (399 F. Supp. at 798). When it submitted the plan to the District Court, the Dallas

City Council lacked the legislative authority to change on its own the council voting system and to provide for the election of eight council members by districts (*id.* at 800):

> Changes to the voting system necessarily are changes to the Charter and absent a judicial determination of unconstitutionality, such changes can only be effected by a Charter Amendment adopted by the voters.[5]

Further, any effort by the Dallas City Council legislatively to "enact or seek to administer" such a change without Federal preclearance was barred by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *United States* v. *Board of Comm'rs of Sheffield*, No. 76-1662 (decided March 6, 1978); *Briscoe* v. *Bell*, 432 U.S. 404 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Bd. of Elections*, *supra*.[6] No such Federal preclearance of the switch to the eight/three plan has been sought or obtained.

In the redistricting cases, this Court has developed certain principles governing court-ordered redistricting plans. The cases articulating these principles and apply-

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[5] Subsequently, the City in April, 1976 did submit its eight/three plan ordered into effect by the District Court to a Charter Amendment vote and the amendment was adopted. However, it still was not submitted for Federal preclearance under § 5. This tactic does not alter the fact that the plan was first adopted by the District Court and ordered into effect for the April, 1975 city council elections. The adoption of the court-ordered plan by the City by Charter Amendment indicates only compliance with the District Court's order.

[6] The State of Texas, and consequently all local jurisdictions, *United States* v. *Board of Election Comm'rs of Sheffield*, *supra*, were brought within the coverage of § 5 of the Voting Rights Act of 1965 by the 1975 amendments to the Act. *See Briscoe* v. *Bell*, *supra*. As amended, § 5 covers all changes in Dallas election laws enacted after November 1, 1972. 42 U.S.C. § 1973c (Supp. V 1975).

ing them make no distinction whether the plan adopted or approved by the court and ordered into effect as a remedy for a constitutional violation is a plan that has been formulated by the District Court, *Connor* v. *Williams*, 404 U.S. 549 (1972), or formulated by the local legislative body itself, *Wallace* v. *House*, 425 U.S. 947 (1976); *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976).

The salient facts of *East Carroll Parish* are similar to those presented here. In 1968, the District Court struck down for malapportionment the wards established for election of members of the East Carroll Parish police jury and school board, and the police jury proposed as a remedy that all members of the policy jury and school board be elected at-large, which the District Court adopted and ordered into effect (424 U.S. at 637). In 1971, the District Court instructed the police jury and school board to file new plans based on 1970 Census data, and the police jury and school board once against submitted their at-large plan. "Following a hearing the District Court again approved the multi-member arrangement" (*id.* at 637-38), holding that there was no dilution of black voting strength because the parish was majority black in population (*Zimmer* v. *McKeithen*, 485 F.2d 1297, 1301 (5th Cir. 1973) (*en banc*)). The Fifth Circuit vacated and remanded, not because the plan failed to comply with the principles governing court-ordered plans, but because at-large voting unconstitutionally diluted black voting strength under the *White* v. *Regester* criteria, *Zimmer* v. *McKeithen*, *supra*.

On certiorari, the black voter intervenors contended that the District Court's plan failed to meet the requirements governing court-ordered plans, while the Solicitor General filed an amicus brief arguing that because the plan was "submitted to [the District Court] on behalf of a local legislative body" (424 U.S. at 638 n.6) it should

be treated as local legislation subject to the requirements of § 5 of the Voting Rights Act. But this Court rejected the Government's contention and declined to depart from the rule "that court-ordered plans resulting from equitable jurisdiction over adversary proceedings are not controlled by § 5" (*id.*).

The Court held that the at-large plan in East Carroll Parish was a court-ordered plan subject to the general principles governing such plans—and not local legislation subject to § 5—because "the reapportionment scheme was submitted and adopted pursuant to court order" (*id.*) and because the police jury lacked the authority under state law (because of a § 5 objection to the 1968 state authorizing legislation) to reapportion itself by adopting at-large elections "on its own authority." Accordingly, when Courts of Appeals have held that the principles governing court-ordered plans are not applicable to plans proposed by local legislative bodies and adopted by District Courts as a remedy for unconstitutional districts, *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1302 (5th Cir. 1973), *aff'd on other grounds sub nom. East Carroll Parish School Bd.* v. *Marshall*, *supra*; *Wallace* v. *House*, 515 F.2d 619, 635-36 (5th Cir. 1974), *vacated and remanded*, 426 U.S. 947 (1976), this Court has granted certiorari either to correct the ground for decision, *East Carroll Parish School Bd.* v. *Marshall*, *supra*, or to vacate the judgment and remand for further consideration, *Wallace* v. *House*, *supra*.

All of the elements of the definition of a court-ordered plan present in *East Carroll Parish* are present here. The city council's plan was submitted to the District Court pursuant to court order (399 F. Supp. at 784); the plan was "ordered" into effect by the District Court (*id.* at 798); and, the city council lacked the authority to enact and implement the eight/three plan on its own both by the City Charter (*id.* at 800) and by the Federal pre-

clearance provisions of § 5 of the Voting Rights Act of 1965.[7]

B. There Is No Distinction Between "Court-Ordered" Plans and "Court-Approved" Plans Applicable Here That Would Permit the City's Eight/Three Plan To Avoid the Principles Governing Court-Ordered Plans.

Contrary to the opinion of Mr. Justice Powell in granting the stay of the Fifth Circuit's judgment, *Wise* v. *Lipscomb*, No. A-149 (August 30, 1977), slip op., p. 3, n. 2, this Court in considering whether the principles governing court-ordered plans apply has never recognized a distinction between a "court-ordered plan" and a "court-approved plan." Indeed, in *East Carroll Parish*, which Mr. Justice Powell cites as an example of a court-ordered plan (*id.*), the Court interchangeably referred to the multi-member plan "approved" (424 U.S. at 638) and "adopted" (*id.* at 638 n.6) by the District Court, and described the action of the District Court as "approving" (*id.* at 638 n.4), "adopting" (*id.* at 639), and "endorsing" (*id.*) the at-large plan.

Both *East Carroll Parish* and *Connor* v. *Waller*, 421 U.S. 656 (1975), indicate that—at least in jurisdictions covered by the Federal preclearance requirements of § 5 of the Voting Rights Act of 1965—there is no third category of "court-approved" plans which circumvent both the principles governing court-ordered plans and the Federal preclearance requirements of § 5 governing legislatively-enacted plans. In *Connor* v. *Waller*, *supra*, the District Court purported to approve an uncleared state legislative reapportionment plan enacted by the Mississippi Legislature to supplant a reapportionment scheme previously struck down by the District Court as unconstitutional, 396 F. Supp. 1308 (S.D. Miss. 1975) (three-judge court). On appeal, this Court reversed, holding that the District Court lacked jurisdiction to approve the plan in the absence of § 5 preclearance (421 U.S. at 656):

> Those Acts are not now and will not be effective as laws until and unless cleared pursuant to § 5. The District Court accordingly also erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination.

The facts of *Connor* v. *Waller* show why the plan at issue here is a court-ordered, and not a legislatively-enacted, plan. Contrary to the city's action here, in *Connor* v. *Waller* the plan was not submitted to the District Court pursuant to court order as a proposed remedy, but rather was enacted by a legislature on its own with full authority to promulgate such a plan (396 F. Supp. at 1311). Further, contrary to the District Court's order here, the District Court did not purport to order the legislature's plan into effect, but merely sustained it against constitutional challenge (396 F. Supp. at 1332).

The cases cited above—*East Carroll Parish* and *Wallace* v. *House*—firmly establish that the principles governing court-ordered plans apply whether the plan has been proposed by a legislative body to the District Court or formulated by the District Court itself, and this firmly established rule of law is salutary and should be followed in this case. First, in enacting and reenacting the Voting Rights Act Congress was aware that states and political subdivisions covered by the suspension-of-voting-tests provision might enact changes in their election laws which would nullify or dilute the newly secured franchise of

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[7] While discussed in *East Carroll Parish*, the legal authority of the local governing body is not crucial to the definition. A local governing body may have full authority to redistrict itself, but if its plan is submitted to the District Court and implemented pursuant to court order, then it still is a court-ordered plan. *Cf. Kirksey* v. *Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir. 1977) (*en banc*), *cert. denied*, —— U.S. —— (No. 77-499, November 28, 1977).

minorities, *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 548, and therefore strict scrutiny of election law changes through Federal preclearance as provided by § 5 was required. The rule first enunciated in *Connor* v. *Johnson*, 402 U.S. 690, 691 (1971), that "[a] decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act" is compatible and not inconsistent with this concern because the Court has developed strict standards governing excepted court-ordered plans to insure against dilution of minority voting strength through at-large elections, *Connor* v. *Johnson*, *supra*, 402 U.S. at 692, or through gerrymandering of district lines, *Connor* v. *Finch*, 431 U.S. 407, 421-26 (1976). *See* Comment, *Section 5: Growth or Demise of Statutory Voting Rights?*, 48 MISS. L.J. 818, 834-36 n.125 (1977).

Any new rule which would allow a redistricting plan submitted to a District Court by a state or political subdivision covered by § 5 to escape both § 5 preclearance *and* the standards governing court-ordered plans would be entirely inconsistent with the intent of Congress in enacting the Voting Rights Act and would invite abuse and circumvention by suspect jurisdictions of the necessarily stringent standards applicable to § 5 review or alternatively to court-ordered plans.

Second, very few court-ordered redistricting plans ordered into effect as a remedy for a constitutional violation are formulated by the District Court itself, particularly in cases involving counties and municipalities. In the typical case, the District Court directs the parties to submit proposed plans, and then selects among the proposed plans for the most efficacious remedy.[8] We cannot believe that this Court, in formulating the special rules governing court-ordered plans and announcing them as general principles governing all "court-ordered plans,"

[8] *See* cases cited on pp. 15-16, *supra*.

Chapman v. *Meier*, 420 U.S. 1, 18 (1975), intended to restrict their applicability to the narrow class of cases in which the District Judges themselves actually draw the new district lines. Indeed, such a narrow limitation of the general principles governing court-ordered plans would undermine, weaken, and unduly restrict the broadly beneficial purposes such rules are designed to serve, *Chapman* v. *Meier*, *supra*, 420 U.S. at 15-18.

The Court of Appeals here was correct in treating the eight/three plan proposed by the city council and adopted by the District Court as a court-ordered plan to which the general principles governing court-ordered plans apply.

C. Neither the Impact of the Mexican-American Vote Nor the City's Interest in Citywide Representation Justify a Departure, in This Court-Ordered Redistricting Plan, From the Preference for Single-Member Districts.

As the Court held in *East Carroll Parish School Bd.* v. *Marshall*, *supra*, 424 U.S. at 639:

> We have frequently reaffirmed the rule that when United States district courts are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances. *Chapman* v. *Meier*, 420 U.S. 1, 17-19 (1975); *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973); *Connor* v. *Williams*, 404 U.S. 549, 551 (1972); *Connor* v. *Johnson* [402 U.S. 690] at 692.

In court-ordered plans, multi-member districts and at-large voting are to be avoided because of the "practical weaknesses inherent in such schemes," *Chapman* v. *Meier*, *supra*, 420 U.S. at 15-16:

> First, as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also

> increases. * * * Ballots tend to become unwieldy, confusing, and too lengthy to allow thoughtful consideration. Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specially responsible to them. * * * Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in singlemember districts. * * * Criticism of multimember districts has been frequent and widespread.

Last Term in *Connor* v. *Finch*, 431 U.S. 407, 415 (1977), the Court reiterated:

> Because the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorities, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U.S. 315, 333; *Chapman* v. *Meier*, *supra*, at 21; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636, 639.

Although this principle, sometimes called the *Connor* rule, was first developed in a state legislative reapportionment case, *Connor* v. *Johnson*, *supra*, 402 U.S. at 692, the Court subsequently applied it to cases involving redistricting of a parish, *East Carroll Parish School Bd.* v. *Marshall*, *supra*, and a municipality, *Wallace* v. *House*, *supra*. The rule is not confined to large multi-member districts, but applies to small ones as well, *Chapman* v. *Meier*, *supra* (applied to multi-member districts electing between two and five legislators); *East Carroll Parish School Bd.* v. *Marshall*, *supra* (parish of 12,884 population), and applies regardless of how long a state policy favoring at-large voting has been in effect, *Connor* v. *Finch*, 431 U.S. 407, 415 (1977) (historic policy in effect throughout Mississippi history). The rule also is applicable regardless of whether at-large voting is otherwise unconstitutional for dilution of minority voting strength, *Chapman* v. *Meier*, *supra*, 420 U.S. at 19. Moreover, these cases show that inclusion in a remedial plan of some or even a significant number of single-member districts makes the at-large or multi-member features no less unacceptable in the "court-ordered" context.

The *Connor* rule governing court-ordered plans yields beneficial results and a more effective exercise of the franchise, and therefore only a narrow range of exceptions have been—and should be—allowed. In *Connor* v. *Johnson*, *supra*, this Court directed the District Court to devise a single-member districting plan "absent insurmountable difficulties," 402 U.S. at 692. On remand, the District Court found that it was too close to the regularly scheduled elections and the Census data were insufficiently complete to allow creation of single-member districts, 330 F. Supp. 521 (S.D. Miss. 1971) (three-judge court), and this Court refused further relief, 403 U.S. 928 (1971).

Then in *Mahan* v. *Howell*, 410 U.S. 315 (1973), this Court allowed the creation of only one multi-member district in a statewide legislative reapportionment plan as an "interim remedy" because of a "singular combination of unique factors" (410 U.S. at 333)—the fact that single-member districts, beceause of problems with the Census data, created underrepresentation of military personnel in violation of their constitutional rights (*id.* at 331-332). In no other case has this Court countenanced at-large voting in a court-ordered redistricting plan.

No such factors are present here, and the considerations relied upon by the District Court and advanced by the defendants to justify three at-large seats have previously

been rejected by this Court as insufficient to sustain a departure from the single-member district rule.

(1) *The Mexican-American Vote.*

The District Court held that the mixed eight/three plan would "enhance" political participation opportunities for Mexican-Americans without "undermining" the limited degree of participation they had gained under the all at-large system (399 F. Supp. at 794). However, the Distirct Court's findings in this regard are contradictory on their face and quite speculative. The District Court noted testimony at the remedy hearing that under the at-large system there had been past discrimination against Mexican-Americans and that Mexican-Americans are denied equal access to the political process, and specifically found "that Mexican-American citizens of Dallas have suffered some restrictions of access to the political processes within the city but that this restriction does not amount to present dilution" (*id.* at 793), and that the "restriction of access which is present for the Mexican-Americans is of a similar nature to that this Court has found to exist for the black voters of Dallas . . . ." (*id.*). Further, the District Court found, "At-large voting may operate in part as a restriction of access for Mexican-Americans as it has been for blacks" (*id.* at 794).

Nevertheless, in the absence of any specific supporting findings of fact, the District Court concluded that an exclusive single-member district plan "would do nothing" to increase Mexican-American political participation, and "*might tend* to decrease it" (*id.* at 793) (emphasis added). Here the conclusions of the District Court are difficult to understand. The District Court failed to articulate how the position of the Mexican-Americans in Dallas was any different from the position of Mexican-Americans in San Antonio, where this Court found in 1973 that single-member districts were necessary to bring

the Mexican-American community "into the full stream of political life," *White* v. *Regester*, *supra*, 412 U.S. at 769. Further, if as the District Court found, Mexican-Americans were able to make political gains under the at-large system as a result of their "swing vote" position and through coalition politics in a community in which they comprise only eight to ten percent of the population, why wouldn't their "swing vote" position be stronger in single-member districts in which they would inevitably constitute a larger percentage of the voters in several individual districts than they would citywide?

Further, in reaching his conclusions, the District Judge applied erroneous legal standards. First, for the Mexican-American concern to fall under the "singular combination of unique factors" standard of *Mahan*, as the District Court thought it did (*id.* at 794), the trial court would have had to find either that single-member districts would result in numerically malapportioned districts causing underrepresentation for the Mexican-Americans, or that single-member districts would deny Mexican-Americans their constitutional rights (*cf. Mahan*, *supra*, 410 U.S. at 331-32). The District Court made neither of these findings. Second, the District Court thought the "enhancing" standard justified retaining three at-large seats (*id.* at 794) because of the Fifth Circuit's apparent holding in *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1308 (5th Cir. 1973), that multi-member districts are unconstitutional unless "a district court determines that multi-member districts afford minorities a greater opportunity for participation in the political processes than do single-member districts." However, this Court has never sanctioned that notion, and in *Zimmer* granted certiorari and affirmed "but without approval of the constitutional views expressed by the Court of Appeals" (*East Carroll Parish*, *supra*, 424 U.S. at 638).

Certainly the effect of any court-ordered redistricting plan on minority groups not specifically represented by the plaintiffs is a valid concern. But the District Court here—because it failed to apply the correct legal standard, and because its findings with regard to the Mexican-Americans are contradictory, speculative, and without adequate support—failed to demonstrate that the position of the Mexican-Americans justified an exception to the *Connor* rule. Further, the Mexican-American community in whose interest the three at-large seats ostensibly were retained, have repudiated the notion that at-large voting enhances their political participation, and have represented that the experience of the 1975 municipal election shows that the three at-large seats actually minimize and cancel out their voting strength (551 F.2d at 1048).

(2) *The Citywide Viewpoint.*

The District Court did not find that at-large, citywide representation on the city council constituted an "unusual circumstance" under the *Connor* rule, was necessary to efficient city administration, or that single-member districts violated the defendant city officials' constitutional rights, but only that three at-large seats were "desireable" [*sic*], a "legitimate governmental interest," and a "benefit" (399 F. Supp. at 794-95). Here again, the findings of the District Court are not sufficient to sustain an exception to the *Connor* rule.

There is nothing "singular," "unique," "unusual," or even "special" about the city's desire in this regard. In most cases in which at-large voting has been struck down, the officials of the state, county, or city submit plans to the District Court which provide for the at-large election of all or some members of the governing body. *See, e.g., Connor* v. *Finch, supra* (state legislature); *Parnell* v. *Rapides Parish Police Jury*, 563 F.2d 180 (5th Cir. 1977) (parish governing body); *Wallace* v. *House*, 515

F.2d 619 (5th Cir. 1975), *vacated and remanded*, 425 U.S. 947 (1976) (municipality). If the Court allows an exception to the *Connor* rule on this ground, then it would be tantamount to abolishing the rule entirely.

This Court has refused to allow an exception to the *Connor* rule for this kind of argument. Last Term in *Connor v. Finch, supra*, the Mississippi officials argued that multi-member legislative districts should be preserved in a court-ordered plan because of Mississippi's historic policy and because legislators need to represent countywide interests, and single-member districts would inevitably fracture county lines. This Court rejected that contention, holding (431 U.S. at 415):

> The defendants' unalloyed reliance on Mississippi's historic policy against fragmenting counties is insufficient to overcome the strong preference for single-member districting that this Court originally announced in this very case.

In *Wallace* v. *House*, 377 F. Supp. 1192 (W.D. La. 1974), *aff'd in part, rev'd in part*, 515 F.2d 619 (5th Cir. 1975), *vacated and remanded*, 425 U.S. 947 (1976), the District Court struck down at-large elections for the Board of Aldermen of the Town of Ferriday, Louisiana, for dilution of black voting strength, and the town proposed two remedial plans, one providing for four aldermen elected from districts and one at-large (the four/one plan), and the second providing for the election of all five aldermen from single-member districts (the five/zero plan) (377 F. Supp. at 1199.) The District Court rejected the four/one plan for the reasons (1) that if the election of five aldermen at-large dilutes black voting strength, then the election of one alderman at-large also unconstitutionally abridges the right to vote (377 F. Supp. at 1199-1200), and (2) any fairly drawn single-member district plan would create three majority black districts and two majority white districts, while the four/

one plan would deprive black voters of an additional seat on the Board and give the Board a three-to-two white majority (*id.* at 1200).

On appeal, the Fifth Circuit affirmed the District Court's findings of unconstitutional dilution, but reversed as to remedy. Citing *Reynolds* v. *Sims*, 377 U.S. 533 (1964), *Burns* v. *Richardson*, 384 U.S. 73 (1966), and *Chapman* v. *Meier*, *supra*, to the effect that reapportionment is primarily a legislative responsibility (515 F.2d at 634-36), the Fifth Circuit held that the District Court failed to give heed to the "rule of deference to state or local legislative policies which are not unconstitutional" (*id.* at 635).

All of the reasons given by the District Court here in support of the eight/three plan were given by the Court of Appeals in *Wallace* in support of the town's preferred four/one plan. First, the Fifth Circuit noted that the "reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties," and while this has not always served the interests of Ferriday's black citizens, "we cannot say that the rationale is so tenuous that it can be disregarded" (*id.* at 633.) Second, the Court of Appeals found that the four/one plan was not unconstitutional, and would in fact enhance black voting strength, because while blacks were excluded from the Board under the all at-large plan they would be able to elect two black aldermen under the four/one plan, and therefore "the Board's mixed plan is a great improvement" (*id.* at 632). Third, the Fifth Circuit noted that at-large voting in aldermanic elections had been the state policy of Louisiana since 1898, and was not rooted in racial discrimination (*id.* at 633). Accordingly, the Fifth Circuit held (*id.* at 636):

> We conclude that the trial court should have adopted the mixed plan in deference to the Board of Aldermen's considered preference for a plan incorporating one at-large place into the aldermanic election scheme.

On petition for writ of certiorari, this Court granted the writ, vacated the Fifth Circuit's judgment, and remanded to the Court of Appeals "for further consideration in light of *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976) . . ." 425 U.S. 947 (1976). The clear implication of this Court's order is that the Fifth Circuit erred in failing to follow the *Connor* rule, and that the reasons given by the appeals court for deferring to the Board of aldermen's preference—including their desire for citywide representation—were insufficient to justify a departure from the preference for single-member districts. On remand, the Fifth Circuit found that no special circumstances existed which would allow a departure from the principle expressed in *East Carroll Parish*, 538 F.2d 1138 (5th Cir. 1976), and this Court subsequently denied defendants' petition for a writ of certiorari, 431 U.S. 965 (1977).

The reasons given by the District Court in the case at bar in favor of its eight/three plan and the arguments advanced by defendants in seeking reversal of the Fifth Circuit's judgment are virtually identical to those relied upon by the Fifth Circuit in its first *Wallace* opinion, which were rejected by this Court in vacating the Fifth Circuit's judgment and subsequently rejected by the Fifth Circuit on remand. There are no findings by the District Court or arguments advanced by defendants which would justify a departure from the action taken by this Court and subsequently by the Fifth Circuit in *Wallace*.

Moreover, there are good reasons why no departure should be permitted here. First, as the Fifth Circuit said on remand, "The term, 'special circumstances,' en-

compasses only the rare, the exceptional, not the usual and diurnal," 538 F.2d at 1144. The arguments made by the city here are the usual arguments typically made in these cases. Second, the District Court in this case found —and these findings are not contested—that the at-large representation which the city argues is necessary to provide a citywide viewpoint on the city council is exactly the same system which unconstitutionally denied the black citizens of Dallas equal access to the political process and operated to their detriment. Third, the overwhelming benefits of single-member districts and their advancement of an effective franchise so cogently outlined by the Court in *Chapman* and *Connor* v. *Finch* are more than sufficient to outweigh the city's claimed interest in citywide representation.

III. ALTERNATIVELY, THE MIXED EIGHT/THREE PLAN ORDERED INTO EFFECT BY THE DISTRICT COURT—BY RETAINING THREE AT-LARGE SEATS—IS CONSTITUTIONALLY INADEQUATE AS A REMEDY FOR UNCONSTITUTIONAL AT-LARGE ELECTIONS.

Even if the Court determines that the remedial plan at issue here is not a court-ordered plan governed by the *Connor* rule, nevertheless the plan proposed by the Dallas City Council is inadequate as a matter of law to cure the constitutional violation conceded to exist. As this Court noted in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975):

> [I]t is the historic purpose of equity to "secur[e] complete justice," *Brown* v. *Swann*, 10 Pet. 593 (1836); see also *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-98 (1946). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).

Equity does complete justice and not by halves. Consequently, in cases involving racial discrimination affecting the right to vote, this Court has held that

> the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Louisiana v. *United States*, 380 U.S. 145, 154 (1965).

These principles of equitable remedies are equally applicable here to do "complete justice" and to grant the "necessary relief." In the redistricting cases, courts must be especially alert that the plan proposed as a remedy does not "[perpetuate] an existent denial of access by the racial minority to the political process," *Kirksey* v. *Board of Supervisors of Hinds County, Miss.*, 554 F.2d 139, 142 (5th Cir. 1977) (*en banc*), *cert. denied*, No. 77-499 (November 28, 1977). Here the city council in its eight/three plan failed in its affirmative obligation to grant complete relief for the constitutional violation. The constitutional violation is at-large voting for members of the Dallas City Council, which the District Court found perpetuates past discrimination against blacks, denies blacks equal access to the political process, and results in minimal representation on the city council of blacks handpicked by the white-dominated slating group. Far from eliminating the discrimination present in at-large voting, the eight/three plan proposed by the city council perpetuates it by retaining three at-large seats. Hence, the proposed remedy fails under well-established equitable principles to grant complete relief or to secure "complete justice." If the nature of the violation determines the scope of the remedy, the remedy is incomplete because it fails to eliminate —and indeed, includes—elements of the violation.

Further, the proposed remedy does not restore Dallas blacks to the position they would have occupied had the violation not occurred. With only two majority black

districts (399 F. Supp. at 795), the city's plan fails to give Dallas blacks a controlling voice in three districts, which they would have had absent the constitutional violation, as evidenced by fairly-drawn plans considered below which would have created three majority black districts (399 F. Supp. at 796 n.20). Thus the city's proposed plan is only a partial remedy for the conceded constitutional violation of *all* at-large seats.

For these reasons, the city's plan is totally inadequate as an equitable remedy for the violation found to exist.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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